Court File No.: A-39-16

FEDERAL COURT OF APPEAL

BETWEEN:

DR. GÁBOR LUKÁCS

Applicant

– and –

CANADIAN TRANSPORTATION AGENCY

Respondent

(Application under section 28 of the *Federal Courts Act*, R.S.C. 1985, c. F-7)

APPLICANT/RESPONDING PARTY MOTION RECORD (Agency's motion for confidentiality)

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WRITTEN REPRESENTATIONS OF THE APPLICANT

OVERVIEW

(i) The application for judicial review (main proceeding)

1. By enacting the *Canada Transportation Act* ("*CTA*"), Parliament imposed a regulatory scheme on air transportation to establish commercial standards and consumer protection measures. The scheme is implemented through the requirement that every person who operates an air service must hold a licence issued by the Canadian Transportation Agency ("Agency"), set out in s. 57(a) of the *CTA*, and conditions imposed on licence holders under the *CTA*.

2. For nearly twenty years, the Agency had been following the so-called *1996 Greyhound Decision* for determining who "operates" an air service within the meaning of the *CTA*, and thus is required to hold a licence. In that decision, the Agency concluded that a person who has commercial control over an air service "operates" it and thus is required to hold a licence, even if the aircraft and the flight crew are rented from another person.

3. At the end of 2015, the Agency announced its proposed new "approach" to licensing, whereby the person with commercial control over the air service, who has a contractual relationship with the public, would not be required to hold a licence as long as the operator of the aircraft is licensed. This exposes the travelling public to significant financial risks and defeats the purpose of the regulatory scheme, which is to regulate the contractual relationship between the travelling public and air service providers.

4. In the present application, Lukács challenges the legality of this new "approach," which is an attempt of the Agency to circumvent the will of Parliament and engage in a legislative exercise under the guise of decision-making.

(ii) The Agency's motion to seal the Complete Greyhound Decision

5. The *1996 Greyhound Decision* represents the "considered and consistent view" of the Agency for nearly twenty years on the meaning of the statutory requirement of holding a licence. Nevertheless, the Agency has kept most of the reasons for the decision under wraps, and released to the public only a summary that does not reveal the Agency's analysis.

***Canada (CHRC) v. Canada*, 2011 SCC 53, para. 53** **Tab 4, p. 51**

6. Lukács is seeking disclosure of the complete unredacted version of the detailed reasons for the Agency's *1996 Greyhound Decision* (the "Complete Greyhound Decision") pursuant to Rule 317.

7. The Agency opposes the request, and it seeks a confidentiality order to suppress approximately 75% of the Complete Greyhound Decision on the grounds that:

(a) it contains "confidential financial or commercial information" of Kelowna Flightcraft Air Charter Ltd., one of the parties to the decision; and

(b) its public disclosure would make parties reluctant to provide the Agency information in the future, and harm the Agency's reputation as being able to maintain a confidential record.

8. As a preliminary matter, it is inconsistent with the Agency's obligation to be independent and impartial to advocate on behalf of certain parties to proceedings before the Agency, and seek a confidentiality order from this Honourable Court for the purpose of protecting the alleged financial or commercial interests of those parties; moreover, the Agency lacks standing to do so.

9. Lukács submits that the Agency's motion lacks any merit, because:

(a) There is not a scintilla of evidence to support the allegation that disclosure of the 20-year-old information contained in the Complete Greyhound Decision to the public or to Lukács, who is not a competitor, is likely to cause harm to any third party.

(b) Parties to proceedings before the Agency cannot be "reluctant" to provide information, because section 25 of the *CTA* provides that the Agency has the powers of a superior court with respect to attendance and examination of witnesses, and the production and inspection of documents.

(c) Compliance with the law, including the rules of this Honourable Court, will only improve and not harm the Agency's reputation.

PART I – STATEMENT OF FACTS

A. THE 1996 GREYHOUND DECISION AND ITS SIGNIFICANCE

10. On February 22, 1996, WestJet Airlines Ltd. filed a complaint with the National Transportation Agency (the predecessor of the Canadian Transportation Agency) against Greyhound Lines of Canada Ltd. ("Greyhound") and Kelowna Flightcraft Air Charter Ltd. ("Kelowna"), alleging that Greyhound was intending to circumvent the provisions of the *National Transportation Act* (the predecessor of the *CTA*) with respect to the licensing of air service providers.

Decision No. 232-A-1996 **Respondent's Rec'd, Tab 1A, p. 7**

11. Contrary to what is suggested by the Agency, the proceeding was not an "inquiry" with respect to Greyhound, but rather the Agency was acting as a quasi-judicial tribunal in an adversarial proceeding between WestJet, Greyhound, and Kelowna, which included pleadings and submissions by the parties.

Agency's Written Representations, para. 16 **Agency's Record, p. 32**

12. On March 29, 1996, in the exercise of its powers under s. 36(1) of the *National Transportation Act* (the predecessor of s. 25 of the *CTA*), the Agency directed the production of "all agreements, arrangements and contracts that have been or are to be entered into between Kelowna and Greyhound and their affiliates concerning proposed operations." On April 3, 1996, the documents were produced and attested to by an affidavit.

Cardozo Affidavit, Exhibit "C" **Agency's Record, Tab 2C, p. 15**

13. On April 12, 1996, in the exercise of its supervisory and protecting power over its own records, the Agency decided not to place the documents received on April 3, 1996 on the public record, but to keep them confidential.

Cardozo Affidavit, Exhibit "C" **Agency's Record, Tab 2C, p. 13**

14. The Agency, being an independent and impartial adjudicator, neither could nor did enter into any agreement with Greyhound and/or Kelowna with respect to the confidentiality of the documents received on April 3, 1996; rather, the Agency was exercising its discretion in deciding to keep them confidential.

15. At the conclusion of the proceeding, the Agency issued the so-called *1996 Greyhound Decision*, with two sets of reasons: a public version that was marked Decision No. 232-A-1996, and the Complete Greyhound Decision that was kept confidential.

Decision No. 232-A-1996 **Respondent's Rec'd, Tab 1A, p. 7**
Cardozo Affidavit, Exhibit "C" **Agency's Record, Tab 2C, p. 15**

16. The *1996 Greyhound Decision* is significant for a number of reasons:

(a) it is one of the first decisions to address the requirement to hold a licence for so-called "Indirect Air Service Providers" ("IASPs" or "resellers"), where a person has commercial control over an air service and makes decisions on matters such as routes, scheduling, and pricing, but performs the transportation of passengers with aircraft and flight crew rented from another person;

(b) it developed an analytic framework for determining who "operates" an air service, and thus is required to hold a licence under the regulatory scheme; and

(c) for nearly twenty years, the Agency had been following its analytic framework with respect to the requirement to hold a licence.

Girard Affidavit, paras. 4-7 **Respondent's Rec'd, Tab 1, p. 2**

B. PROCEDURAL HISTORY OF THE APPLICATION

17. The provisions of the *CTA* relating to the requirement to hold a licence have remained unchanged for the past twenty years. Nevertheless, in December 2015, the Agency announced that it would conduct a public consultation on the requirement for IASPs to hold a licence, and that the Agency was considering implementing the following "Approach under consideration":

> Indirect Air Service Providers would not normally be required to hold a licence to sell air services directly to the public, as long as they charter licenced air carriers to operate the flights. This would apply to the operation of domestic and international air services. As these providers would not be subject to the licensing requirements, contracts they enter into with the public would not be subject to tariff protection, nor would they be subject to the financial and Canadian ownership requirements.
>
> [Emphasis added.]

Girard Affidavit, Exhibit "D" **Respondent's Rec'd, Tab 1D, p. 30**

18. On January 22, 2016, Lukács brought the present application, pursuant to s. 28 of the *Federal Courts Act*, in respect of the "Approach under consideration," seeking among other things:

(a) a declaration that the Agency has no jurisdiction to make a decision or order that has the effect of exempting and/or excluding IASPs from the statutory requirement of holding a licence; and

(b) a prohibition enjoining the Agency from making such a decision or order.

In the Notice of Application, Lukács requested pursuant to Rule 317 that the Agency disclose the Complete Greyhound Decision, since the *1996 Greyhound Decision* was explicitly referenced in the consultation document of the Agency.

Notice of Application **Applicant's Record, Tab 1, p. 11**

19. On February 11, 2016, the Agency objected to the request, primarily on the basis of confidentiality, and secondarily on the basis of irrelevance.

20. On February 20, 2016, Lukács sought directions from this Honourable Court with respect to the Agency's objection, pursuant to Rule 318(3). While awaiting directions from the Court, the parties followed the timelines for serving and filing material set out in Rules 309-310:

(a) on March 16, 2016, Lukács served and filed his Applicant's Record; and

(b) on April 5, 2016, the Agency served and filed its Respondent's Record.

21. In light of the April 5, 2016 Order and Reasons of this Honourable Court and the outstanding matter of the Complete Greyhound Decision, no Requisition for Hearing has been filed yet.

C. RELATED PROCEEDING: MOTION FOR LEAVE TO APPEAL (FILE NO.: 16-A-17)

22. On March 29, 2016, without waiting for the determination of the present application, the Agency issued Decision No. 100-A-2016, in which it held that:

(a) IASPs (resellers) are not required to hold a licence as long as they do not hold themselves out to the public as an air carrier operating an air service; and

(b) NewLeaf Travel Company Inc., a start-up IASP, is not required to hold a licence.

Decision No. 100-A-2016 **Respondent's Rec'd, Tab 11, p. 442**

23. On April 19, 2016, Lukács made a motion for leave to appeal from Decision No. 100-A-2016 of the Agency, pursuant to s. 41 of the *CTA*. The arguments raised in the present application and the proposed appeal overlap, and the Agency heavily relies on Decision No. 100-A-2016 in opposing the present application; however, the remedies being sought differ:

(a) in the present application, Lukács seeks certain declarations and a prohibition against the Agency pursuant to ss. 18, 18.1, and 28 of the *Federal Courts Act*;

(b) in the proposed appeal in File No. 16-A-17, Lukács is seeking to set aside Decision No. 100-A-2016 of the Agency, pursuant to s. 41 of the *CTA*.

24. Since Lukács cannot seek all these remedies in a single proceeding, Lukács is asking as part of the motion for leave to appeal that the proposed appeal be heard together with the present application in order to conserve judicial resources.

PART II – STATEMENT OF THE POINTS IN ISSUE

25. The questions to be decided on this motion are:

(a) whether it is appropriate for the Agency to seek a confidentiality order for the purpose of protecting the alleged financial or commercial interests of certain parties to a proceeding before the Agency;

(b) whether an order of confidentiality should be made with respect to the Complete Greyhound Decision, and if so, what its terms should be;

(c) whether the Agency should be required to disclose the Complete Greyhound Decision; and

(d) schedule for remaining steps in the application.

PART III – STATEMENT OF SUBMISSIONS

A. PROPRIETY OF THE AGENCY'S MOTION AND LACK OF STANDING

26. The Agency is seeking a confidentiality order, in part, because public disclosure of the Complete Greyhound Decision would allegedly "cause real and substantial financial, commercial harm to Kelowna and Greyhound" and that Kelowna "does not consent to the release of the confidential reasons."

Agency's Written Representations, para. 19 Agency's Record, p. 33

27. The Agency's has dealt with Greyhound and Kelowna in its capacity as an independent and impartial adjudicator. As such, it is not appropriate for the Agency to advocate before this Honourable Court on behalf of these or any other parties to proceedings before the Agency. Doing so creates an air of partisanship, and harms public confidence in the impartiality of the Agency.

28. The Agency has no standing to seek confidentiality on behalf of Greyhound and Kelowna to protect the alleged interests of these corporations, which are perfectly capable of retaining counsel and protecting their interests if they choose to do so.

29. Thus, it is submitted that, to the extent that it concerns the protection of the private interests of Kelowna and Greyhound in the confidentiality of the Complete Greyhound Decision, the Agency's motion for confidentiality is inappropriate, contrary to public policy, and was brought without standing.

B. CONFIDENTIALITY

(i) The open court principle and the *Sierra Club* test

30. A party seeking a confidentiality order must overcome the strong presumption, created by the open court principle, which is inextricably tied to the rights guaranteed by s. 2(b) of the *Charter*, that court proceedings and records are open and accessible to the public.

***Sierra Club v. Canada (Minister of Finance)*, 2002 SCC 41, para. 36**
Agency's Record, Tab 3B, p. 56

31. A confidentiality order should be granted only if:

(a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk; and

(b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

***Sierra Club v. Canada (Minister of Finance)*, 2002 SCC 41, para. 53**
Agency's Record, Tab 3B, pp. 63-64

32. The risk under this test must be real and substantial, well grounded in the evidence, and posing a serious threat to an interest that can be expressed in terms of public interest in confidentiality. In the absence of such risk, the motion for confidentiality must fail.

***Sierra Club v. Canada (Minister of Finance)*, 2002 SCC 41, paras. 54-55**
Agency's Record, Tab 3B, p. 64

(ii) No serious risk to an "important interest"

33. The Agency's position is based on the erroneous premise that this Honourable Court is bound by the Agency's views and findings with respect to the confidentiality of the Complete Greyhound Reasons. But the Agency cannot dictate to this Honourable Court how to conduct the present application, and the Agency's premise was explicitly rejected in the April 5, 2016 Reasons for Order of the Court:

> [11] Regardless of the manner in which the Court proceeds, when determining the validity of an objection under Rule 318(2) what standpoint should it adopt? Is the Court reviewing the administrative decision-maker's decision to object?
>
> [12] No. [...] The Court, regulating its own proceedings, must apply its own standards and not defer to the administrative decision-maker's view. [...]
>
> ***Lukács v. CTA*, 2016 FCA 103, paras 11-12**

34. Consequently, the question on the present motion is not whether the Agency considers it necessary to maintain the confidentiality of the Complete Greyhound Decision, but rather whether this Honourable Court finds that there is a serious risk to an "important interest" if the Complete Greyhound Decision is placed on the Court's public record.

(a) <u>Kelowna and Greyhound</u>

35. The Complete Greyhound Decision was made on April 16, 1996. Thus, any information in it is more than 20 years old. The Agency tendered no evidence capable of explaining how public disclosure of 20-year-old information could possibly be used by competitors to the detriment of Kelowna and/or Greyhound, who abandoned their joint venture some 19 years ago.

36. On April 12, 2016, Ms. Tracy Medve, the president of Kelowna, wrote to Mr. Cardozo of the Agency that Kelowna refuses to "grant permission to release" the Complete Greyhound Decision, and stated that

> The reason for refusal to grant permission to release is that these documents contain sensitive commercial information the release of which could result in commercial harm to Kelowna Flightcraft Air Charter Ltd.
>
> [Emphasis added.]

Cardozo Affidavit, Exhibit "C" **Agency's Record, Tab 2B, p. 9**

37. There are several difficulties with the Agency's reliance on this email. First, Ms. Medve did not swear an affidavit on her own on which she could have been cross-examined. As such, her email is not admissible as evidence of the truth of is content (inadmissible hearsay).

***R. v. Schwartz*, [1988] 2 S.C.R. 443, para. 58** **Tab 7, p. 113**

38. Second, Ms. Medve's statement that public disclosure "could result" in commercial harm does not meet the threshold of "real and substantial" risk.

39. Third, Ms. Medve's email provides no explanation as to how public disclosure of 20-year-old information could possibly cause any harm, even if the information was sensitive back in 1996.

40. Finally, the Supreme Court of Canada explicitly rejected the premise that the private interest of a company could qualify as an "important interest":

> For example, a private company could not argue simply that the existence of a particular contract should not be made public because to do so would cause the company to lose business, thus harming its commercial interests.

***Sierra Club v. Canada (Minister of Finance)*, 2002 SCC 41, para. 55**
Agency's Record, Tab 3B, p. 64

(b) The Agency

41. The Agency's argument relating to the willingness of parties to provide information to the Agency is based on the premises that parties get to choose what information they provide to the Agency and that the information is provided in exchange for some form of undertaking by the Agency that it would keep the information confidential. Both premises are false.

42. First, parties to proceedings before the Agency do not get to pick and choose what information they provide, as section 25 of the *CTA* states that:

> **25** The Agency has, with respect to all matters necessary or proper for the exercise of its jurisdiction, the attendance and examination of witnesses, the production and inspection of documents, the enforcement of its orders or regulations and the entry on and inspection of property, all the powers, rights and privileges that are vested in a superior court.
>
> [Emphasis added.]

***Canada Transportation Act*, s. 25** **Tab 2, p. 26**

43. Second, parties to proceedings before the Agency have no expectation nor guarantee with respect to the confidentiality of any document that they submit. On the contrary, since the Agency is bound by the open court principle, documents filed with the Agency are generally placed on the public record unless a party makes a request for confidentiality at the time of filing and the Agency grants the request in the exercise of its discretion. If request for confidentiality is denied, the Agency may place the document on the public record.

***Lukács v. CTA*, 2015 FCA 140, para. 54** **Tab 6, p. 83**

***Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings)*, SOR/2014-104, ss. 7 and 31(5)(b)** **Tab 3, pp. 28 & 30**

44. Finally, any reasonable person understands that the Agency is subject to the supervisory jurisdiction of this Honourable Court, and that compliance with the rules of this Court may require the Agency to disclose its record, including documents that were placed on its confidential record.

45. Therefore, the Agency's claim that public disclosure of the Complete Greyhound Decision would "negatively impact the Agency's ability to fulfill its mandate" and harm "the Agency's reputation as being able to maintain a confidential record" is both fictitious and frivolous.

46. Hence, it is submitted that the Agency failed to establish that disclosure of the Complete Greyhound Decision would create a "serious risk to an important interest" within the meaning of the *Sierra Club* test, the Agency's motion must fail, and the Complete Greyhound Decision should be placed on the Court's public record in its entirety.

(iii) Alternative measures

47. Since there is no "serious risk to an important interest," it is not necessary to consider alternative measures.

48. Alternatively, even if there were any risk of harm associated with the public disclosure of the Complete Greyhound Decision, which is explicitly denied, such risk does not exist with respect to disclosure to Lukács, who is not a competitor of Greyhound or Kelowna. Thus, it is submitted that as an alternative to public disclosure, the Complete Greyhound Decision should be disclosed to Lukács in its entirety and without any redactions.

C. RELEVANCE

49. In *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, where the question before the court was about the authority of the tribunal to make decisions of a certain nature, the Supreme Court of Canada held that:

> Despite the limited weight of the factor, this Court has permitted consideration of an administrative body's own interpretation of its enabling legislation [...] While of course not conclusive, this sort of opinion about the proper interpretation of the provision may be consulted by the court provided it meets the threshold test of relevance and reliability (see Sullivan, at p. 575; Côté, at pp. 633-38). In my view, the considered and consistent view of the Commission itself about the meaning of its constitutive statute meets these requirements.
>
> [Emphasis added.]

***Canada (CHRC) v. Canada*, 2011 SCC 53, para. 53** **Tab 4, p. 51**

50. This principle is particularly relevant in the present case, because in the past twenty years Parliament chose not to amend the provisions of the *CTA* relating to the requirement to hold a licence, while the *CTA* was amended on a number of occasions.

51. In the case at bar, it is common ground that for nearly twenty years, the Agency had been following the *1996 Greyhound Decision* with respect to the requirement of holding a licence (and thus being subject to the regulatory scheme and the Agency's jurisdiction). As such, the decision represents the "considered and consistent view" of the Agency for the past nearly twenty years immediately preceding the new "approach" that is being challenged in the present application.

Girard Affidavit, paras. 4-7 **Respondent's Rec'd, Tab 1, p. 2**

52. Thus, the Complete Greyhound Decision, which is the complete and unredacted reasons for the *1996 Greyhound Decision*, is relevant to the present application.

53. The Agency only disclosed approximately 25% of the Complete Greyhound Decision in its motion record, while keeping the remaining 75% redacted. The extent of the redactions makes it virtually impossible to understand the Agency's analysis, and significantly interferes with the ability of Lukács to present arguments based on the analysis.

Cardozo Affidavit, Exhibit "C" **Agency's Record, Tab 2C, p. 15**

54. Hence, Lukács asks this Honourable Court to order the Agency to disclose the Complete Greyhound Decision in its entirety and without redactions.

D. REMAINING STEPS IN THE APPLICATION

(i) Supplementary Records

55. The Agency and Lukács have agreed that Lukács should be permitted to file a Supplementary Record to address the portions of the Complete Greyhound Decision that will eventually be disclosed, and Decision No. 100-A-2016, which was issued after the Applicant's Record was served and filed.

56. Lukács does not object to the Agency filing a Supplementary Factum, provided that the Agency shall make no submissions to fortify its reasons for Decision No. 100-A-2016.

(ii) Hearing by videoconference

57. Lukács welcomes hearing the application by way of videoconference.

(iii) Timelines

58. Lukács proposes to serve and file his Supplementary Record by the later of: (1) May 13, 2016; and (2) within ten days of the receipt of the Complete Greyhound Decision (or portions thereof).

59. Lukács proposes that the Agency serve and file its Supplementary Factum within 5 days after the service of the Applicant's Supplementary Record.

60. Lukács proposes that a Requisition for Hearing be served and filed within 5 days after the service of the Agency's Supplementary Factum.

61. Lukács further submits that it would be in the interest of judicial economy to have the present application and the appeal proposed in File No. 16-A-17 heard at the same time.

E. COSTS

62. There are a number of factors that militate in favour of a costs award against the Agency and in favour of Lukács:

(a) The Agency's initial objection, in February 2016, to the disclosure of the Complete Greyhound Decision was entirely unwarranted. As the Agency conceded on the present motion, at least portions of the document can be publicly disclosed, and those portions should have been disclosed in February 2016.

(b) The Agency unreasonably and unnecessarily resisted the Rule 317 request on the basis of confidentiality, a complex matter requiring evidence to establish the objection.

(c) The Agency advanced improper grounds for its claim of confidentiality, relating to the private interests of Greyhound and Kelowna. This conduct is inconsistent with the requirement that the Agency act independently and impartially.

(d) Dealing with the Agency confidentiality-based objection unnecessarily occupied considerable judicial resources.

(e) The Agency's objection unnecessarily delayed the present application, whose expedited hearing is in the public interest.

63. In these circumstances, Lukács is asking the Honourable Court to follow its past jurisprudence and award him $500.00 as a moderate allowance for his time devoted to responding to the present motion and his disbursements relating to the present motion, payable by the Agency forthwith and in any event of the cause.

***Lukács v. CTA*, 2015 FCA 140, para. 82**	**Tab 6, p. 89**
***Lukács v. CTA*, 2014 FCA 205, para. 15**	**Tab 5, p. 63**

PART IV – ORDER SOUGHT

64. The Applicant, Dr. Gábor Lukács, is seeking an Order:

(a) dismissing the Agency's motion for confidentiality;

(b) directing the Agency to disclose to Lukács the Complete Greyhound Decision in its entirety;

(c) setting a schedule for the remaining steps in the application;

(d) directing the Agency to pay Lukács forthwith and in any event of the cause:

i. all disbursements related to the present motion; and

ii. moderate allowance for the time and effort Lukács devoted to responding to the present motion; and

(e) granting such further relief as this Honourable Court may deem just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

April 20, 2016

DR. GÁBOR LUKÁCS

Halifax, NS

lukacs@AirPassengerRights.ca

Applicant

PART V – LIST OF AUTHORITIES

STATUTES AND REGULATIONS

Canada Transportation Act, S.C. 1996, c. 10,
s. 25

Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings),
S.O.R./2014-104
ss. 7, 31

CASE LAW

Canada (Canadian Human Rights Commission) v. Canada (Attorney General), 2011 SCC 53

Lukács v. Canada (Canadian Transportation Agency), 2015 FCA 140

R. v. Schwartz, [1988] 2 S.C.R. 443

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CANADA

CONSOLIDATION

CODIFICATION

Canada Transportation Act

Loi sur les transports au Canada

S.C. 1996, c. 10

L.C. 1996, ch. 10

Current to February 15, 2016

Last amended on July 30, 2015

À jour au 15 février 2016

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(a) maintain a record in which shall be entered a true copy of every rule, order, decision and regulation of the Agency and any other documents that the Agency requires to be entered in it; and

(b) keep at the Agency's office a copy of all rules, orders, decisions and regulations of the Agency and the records of proceedings of the Agency.

a) de la tenue du registre du texte authentique des règles, arrêtés, règlements et décisions de l'Office et des autres documents dont celui-ci exige l'enregistrement;

b) de la conservation, dans les bureaux de l'Office, d'un exemplaire des règles, arrêtés, règlements, décisions et procès-verbaux de celui-ci.

Entries in record

(2) The entry of a document in the record referred to in paragraph (1)(a) shall constitute the original record of the document.

Original

(2) Le document enregistré en application de l'alinéa (1)a) en constitue l'original.

Copies of documents obtainable

22 On the application of any person, and on payment of a fee fixed by the Agency, the Secretary of the Agency or, in the absence of the Secretary, the person assigned by the Chairperson to act in the absence shall issue under the seal of the Agency to the applicant a certified copy of any rule, order, regulation or any other document that has been issued by the Agency.

Copies conformes

22 Le secrétaire de l'Office, ou la personne chargée par le président d'assurer son intérim, délivre sous le sceau de l'Office, sur demande et contre paiement des droits fixés par celui-ci, des copies certifiées conformes des règles, arrêtés, règlements ou autres documents de l'Office.

Judicial notice of documents

23 (1) Judicial notice shall be taken of a document issued by the Agency under its seal without proof of the signature or official character of the person appearing to have signed it.

Admission d'office

23 (1) Les documents délivrés par l'Office sous son sceau sont admis d'office en justice sans qu'il soit nécessaire de prouver l'authenticité de la signature qui y est apposée ou la qualité officielle du signataire.

Evidence of deposited documents

(2) A document purporting to be certified by the Secretary of the Agency as being a true copy of a document deposited or filed with or approved by the Agency, or any portion of such a document, is evidence that the document is so deposited, filed or approved and, if stated in the certificate, of the time when the document was deposited, filed or approved.

Preuve

(2) Le document censé être en tout ou en partie la copie certifiée conforme, par le secrétaire de l'Office, d'un document déposé auprès de celui-ci, ou approuvé par celui-ci, fait foi du dépôt ou de l'approbation ainsi que de la date, si elle est indiquée sur la copie, de ce dépôt ou de cette approbation.

Powers of Agency

Policy governs Agency

24 The powers, duties and functions of the Agency respecting any matter that comes within its jurisdiction under an Act of Parliament shall be exercised and performed in conformity with any policy direction issued to the Agency under section 43.

Agency powers in general

25 The Agency has, with respect to all matters necessary or proper for the exercise of its jurisdiction, the attendance and examination of witnesses, the production and inspection of documents, the enforcement of its orders or regulations and the entry on and inspection of property,

Attributions de l'Office

Directives

24 Les attributions de l'Office relatives à une affaire dont il est saisi en application d'une loi fédérale sont exercées en conformité avec les directives générales qui lui sont données en vertu de l'article 43.

Pouvoirs généraux

25 L'Office a, à toute fin liée à l'exercice de sa compétence, la comparution et l'interrogatoire des témoins, la production et l'examen des pièces, l'exécution de ses arrêtés ou règlements et la visite d'un lieu, les attributions d'une cour supérieure.

CANADA

CONSOLIDATION

CODIFICATION

Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings)

Règles de l'Office des transports du Canada (Instances de règlement des différends et certaines règles applicables à toutes les instances)

SOR/2014-104

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Filing of Documents and Sending of Copy to Parties

Filing

7 (1) Any document filed under these Rules must be filed with the Secretary of the Agency.

Agency's public record

(2) All filed documents are placed on the Agency's public record unless the person filing the document files, at the same time, a request for confidentiality under section 31 in respect of the document.

Copy to parties

8 A person that files a document must, on the same day, send a copy of the document to each party or, if a party is represented, to the party's representative, except if the document is

(a) a confidential version of a document in respect of which a request for confidentiality is filed under section 31;

(b) an application; or

(c) a position statement.

Means of transmission

9 Documents may be filed with the Agency and copies may be sent to the other parties by courrier, personal delivery, email, facsimile or other electronic means specified by the Agency.

Facsimile — cover page

10 A person that files or sends a document by facsimile must include a cover page indicating the total number of pages transmitted, including the cover page, and the name and telephone number of a contact person if problems occur in the transmission of the document.

Electronic transmission

11 (1) A document that is sent by email, facsimile or other electronic means is considered to be filed with the Agency and received by the other parties on the date of its transmission if it is sent at or before 5:00 p.m. Gatineau local time on a business day. A document that is sent after 5:00 p.m. Gatineau local time or on a day that is not a business day is considered to be filed with the Agency and received by the other parties on the next business day.

Dépôt de documents et envoi de copies aux autres parties

Dépôt

7 (1) Le dépôt de documents au titre des présentes règles se fait auprès du secrétaire de l'Office.

Archives publiques de l'Office

(2) Les documents déposés sont versés aux archives publiques de l'Office, sauf si la personne qui dépose le document dépose au même moment une requête de confidentialité, en vertu de l'article 31, à l'égard du document.

Copie aux autres parties

8 La personne qui dépose un document envoie le même jour une copie du document à chaque partie ou à son représentant, le cas échéant, sauf s'il s'agit :

a) d'une version confidentielle d'un document à l'égard duquel une requête de confidentialité a été déposée en vertu de l'article 31;

b) d'une demande;

c) d'un énoncé de position.

Modes de transmission

9 Le dépôt de documents et l'envoi de copies aux autres parties peut se faire par remise en mains propres, par service de messagerie, par courriel, par télécopieur ou par tout autre moyen électronique que précise l'Office.

Télécopieur — page couverture

10 La personne qui dépose ou transmet un document par télécopieur indique sur une page couverture le nombre total de pages transmises, y compris la page couverture, ainsi que le nom et le numéro de téléphone d'une personne à joindre en cas de difficultés de transmission.

Transmission électronique

11 (1) Le document transmis par courriel, télécopieur ou tout autre moyen électronique est considéré comme déposé auprès de l'Office et reçu par les autres parties à la date de la transmission s'il a été envoyé un jour ouvrable au plus tard à 17 heures, heure de Gatineau; sinon, il est considéré comme déposé et reçu le jour ouvrable suivant.

Response

(2) Any party may file a response to the request. The response must be filed within three business days after the day on which they receive a copy of the request and must include the information referred to in Schedule 14.

Reply

(3) The person that filed the request may file a reply to the response. The reply must be filed within one business day after the day on which they receive a copy of the response and must include the information referred to in Schedule 15.

No new issues

(4) The reply must not raise issues or arguments that are not addressed in the response or introduce new evidence unless a request has been filed to that effect and the request has been granted by the Agency.

Request for Confidentiality

Confidential treatment

31 (1) A person may file a request for confidentiality in respect of a document that they are filing. The request must include the information referred to in Schedule 17 and must be accompanied by, for each document identified as containing confidential information,

(a) one public version of the document from which the confidential information has been redacted; and

(b) one confidential version of the document that identifies the confidential information that has been redacted from the public version of the document and that includes, at the top of each page, the words: "CONTAINS CONFIDENTIAL INFORMATION" in capital letters.

Agency's record

(2) The request for confidentiality and the public version of the document from which the confidential information has been redacted are placed on the Agency's public record. The confidential version of the document is placed on the Agency's confidential record pending a decision of the Agency on the request for confidentiality.

Request for disclosure

(3) Any party may oppose a request for confidentiality by filing a request for disclosure. The request must be filed within five business days after the day on which they receive a copy of the request for confidentiality and must include the information referred to in Schedule 18.

Réponse

(2) La partie qui souhaite déposer une réponse à la requête le fait dans les trois jours ouvrables suivant la date de réception de la copie de la requête. La réponse comporte les éléments visés à l'annexe 14.

Réplique

(3) La personne ayant déposé la requête et qui souhaite déposer une réplique à la réponse le fait au plus tard un jour ouvrable après la date de réception de la copie de la réponse. La réplique comporte les éléments visés à l'annexe 15.

Nouvelles questions

(4) La réplique ne peut soulever des questions ou arguments qui ne sont abordés dans la réponse, ni introduire de nouvelle preuve, sauf sur autorisation de l'Office à la suite d'une requête déposée en ce sens.

Requête de confidentialité

Traitement confidentiel

31 (1) Toute personne peut déposer une requête de confidentialité portant sur un document qu'elle dépose. La requête comporte les éléments visés à l'annexe 17 et, pour chaque document désigné comme étant confidentiel :

a) une version publique du document, de laquelle les renseignements confidentiels ont été supprimés;

b) une version confidentielle du document, qui indique les passages qui ont été supprimés de la version publique du document et qui porte la mention « CONTIENT DES RENSEIGNEMENTS CONFIDENTIELS » en lettres majuscules au haut de chaque page.

Archives de l'Office

(2) La requête de confidentialité et la version publique du document de laquelle les renseignements confidentiels ont été supprimés sont versées aux archives publiques de l'Office. La version confidentielle du document est versée aux archives confidentielles de l'Office en attendant que celui-ci statue sur la requête.

Requête de communication

(3) La partie qui souhaite s'opposer à une requête de confidentialité dépose une requête de communication dans les cinq jours ouvrables suivant la date de réception de la copie de la requête de confidentialité. La requête de communication comporte les éléments visés à l'annexe 18.

Response to request for disclosure

(4) The person that filed the request for confidentiality may file a response to a request for disclosure. The response must be filed within three business days after the day on which they receive a copy of the request for disclosure and must include the information referred to in Schedule 14.

Agency's decision

(5) The Agency may

(a) if the Agency determines that the document is not relevant to the dispute proceeding, decide to not place the document on the Agency's record;

(b) if the Agency determines that the document is relevant to the dispute proceeding and that no specific direct harm would likely result from its disclosure or that any demonstrated specific direct harm is not sufficient to outweigh the public interest in having it disclosed, decide to place the document on the Agency's public record; or

(c) if the Agency determines that the document is relevant to the dispute proceeding and that the specific direct harm likely to result from its disclosure justifies confidentiality,

(i) decide to confirm the confidentiality of the document or any part of it and keep the document or part of the document on the Agency's confidential record,

(ii) decide to place a version of the document or any part of it from which the confidential information has been redacted on the Agency's public record,

(iii) decide to keep the document or any part of it on the Agency's confidential record but require that the person requesting confidentiality provide a copy of the document or part of the document in confidence to any party to the dispute proceeding, or to certain of their advisors, experts and representatives, as specified by the Agency, after the person requesting confidentiality has received a signed undertaking of confidentiality from the person to which the copy is to be provided, or

(iv) make any other decision that it considers just and reasonable.

Filing of undertaking of confidentiality

(6) The original copy of the undertaking of confidentiality must be filed with the Agency.

Réponse à la requête de communication

(4) La personne ayant déposé la requête de confidentialité et qui souhaite déposer une réponse à une requête de communication le fait dans les trois jours ouvrables suivant la date de réception de copie de la requête de communication. La réponse comporte les éléments visés à l'annexe 14.

Décision de l'Office

(5) L'Office peut :

a) s'il conclut que le document n'est pas pertinent au regard de l'instance de règlement des différends, décider de ne pas le verser aux archives de l'Office;

b) s'il conclut que le document est pertinent au regard de l'instance de règlement des différends et que sa communication ne causerait vraisemblablement pas de préjudice direct précis ou que l'intérêt du public à ce qu'il soit communiqué l'emporte sur le préjudice direct précis qui pourrait en résulter, décider de le verser aux archives publiques de l'Office;

c) s'il conclut que le document est pertinent au regard de l'instance de règlement des différends et que le préjudice direct précis que pourrait causer sa communication justifie le traitement confidentiel :

(i) décider de confirmer le caractère confidentiel du document ou d'une partie de celui-ci et garder le document ou une partie de celui-ci dans ses archives confidentielles,

(ii) décider qu'une version ou une partie du document, de laquelle les renseignements confidentiels ont été supprimés, soit versée à ses archives publiques,

(iii) décider de garder le document ou une partie de celui-ci dans ses archives confidentielles, mais exiger que la personne qui demande la confidentialité fournisse une copie du document ou une partie de celui-ci de façon confidentielle à une partie à l'instance, à certains de ses conseillers, experts ou représentants, tel qu'il le précise, après que la personne qui demande la confidentialité ait reçu un engagement de non-divulgation signé de chaque personne à qui le document devra être envoyé,

(iv) rendre toute autre décision qu'il estime juste et raisonnable.

Dépôt de l'engagement de non-divulgation

(6) L'original de l'engagement de non-divulgation est déposé auprès de l'Office.

Indexed as:

Canada (Canadian Human Rights Commission) v. Canada (Attorney General)

Canadian Human Rights Commission and Donna Mowat, Appellants;
v.
Attorney General of Canada, Respondent, and
Canadian Bar Association and Council of Canadians with Disabilities, Interveners.

[2011] 3 S.C.R. 471

[2011] 3 R.C.S. 471

[2011] S.C.J. No. 53

[2011] A.C.S. no 53

2011 SCC 53

File No.: 33507.

Supreme Court of Canada

Heard: December 13, 2010;
Judgment: October 28, 2011.

Present: McLachlin C.J. and LeBel, Deschamps, Abella, Charron, Rothstein and Cromwell JJ.

(65 paras.)

Appeal From:

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Catchwords:

Administrative law -- Judicial review -- Standard of review -- Canadian Human Rights Tribunal

awarding legal costs to complainant -- Whether standard of reasonableness applicable to Tribunal's decision to award costs -- Whether Tribunal made a reviewable error in awarding costs to complainant -- Canadian Human Rights Act, R.S.C. 1985, c. H-6, s. 53(2)(c), (d).

Administrative law -- Boards and tribunals -- Jurisdiction -- Costs -- Canadian Human Rights Tribunal awarding legal costs to complainant -- Whether Tribunal having jurisdiction to award costs -- Canadian Human Rights Act, R.S.C. 1985, c. H-6, s. 53(2)(c), (d).

Summary:

M filed a human rights complaint with the Canadian Human Rights Commission alleging that the Canadian Forces had discriminated against her on the ground of sex contrary to the provisions of the *Canadian Human Rights Act* ("*CHRA*"). The Canadian Human Rights Tribunal ("Tribunal") concluded that M's complaint of sexual harassment was substantiated in part and she was awarded $4,000 to compensate for "suffering in respect [page472] of feelings or self-respect". M applied for legal costs. The Tribunal determined that it had the authority to order costs pursuant to s. 53(2)(*c*) and (*d*) of the *CHRA* and awarded M $47,000 in this regard. The Federal Court upheld the Tribunal's decision on its authority to award costs. The Federal Court of Appeal allowed an appeal of this decision and held that the Tribunal had no authority to make a costs award.

Held: The appeal should be dismissed.

Administrative tribunals are generally entitled to deference in respect of the legal interpretation of their home statutes and laws or legal rules closely connected to them. However, general questions of law that are both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise must be reviewed on a standard of correctness. The proper standard of review of the Tribunal's decision to award legal costs to the successful complainant is reasonableness. Whether the Tribunal has the authority to award costs is a question of law which is located within the core function and expertise of the Tribunal and which relates to the interpretation and the application of its enabling statute. This issue is neither a question of jurisdiction, nor a question of law of central importance to the legal system as a whole falling outside the Tribunal's area of expertise within the meaning of *Dunsmuir*.

The precise interpretive question before the Tribunal was whether the words of s. 53(2)(*c*) and (*d*), which authorize the Tribunal to "compensate the victim ... for any expenses incurred by the victim as a result of the discriminatory practice" permit an award of legal costs. An examination of the text, context and purpose of these provisions reveals that the Tribunal's interpretation was not reasonable. Human rights legislation expresses fundamental values and pursues fundamental goals. It must be interpreted liberally and purposively so that the rights enunciated are given their full recognition and effect. However, the intent of Parliament must be respected by reading the words of their provision in their entire context and according to their grammatical and ordinary sense, harmoniously with the scheme and object of the Act. The words "any expenses incurred by the

victim" taken on their own and divorced from their context are wide enough to include legal costs. However, when these words are read in their statutory context, they cannot reasonably be interpreted as creating a stand-alone category of compensation capable of supporting any type of disbursement causally connected [page473] to the discrimination. The Tribunal's interpretation violates the legislative presumption against tautology, makes the repetition of the term "expenses" redundant and fails to explain why the term is linked to the particular types of compensation described in those paragraphs. Moreover, the term "costs" has a well-understood meaning that is distinct from compensation or expenses. If Parliament intended to confer authority to confer costs, it is difficult to understand why it did not use this very familiar and widely used legal term of art to implement that purpose. The legislative history of the *CHRA*, the Commission's understanding of costs authority as well as a review of parallel provincial legislation all support the conclusion that the Tribunal has no authority to award costs. Finally, the Tribunal's interpretation would permit it to make a free-standing award for pain and suffering coupled with an award of legal costs in a potentially unlimited amount. This view is difficult to reconcile with either the monetary limit of an award for pain and suffering or the omission of any express authority to award expenses in s. 53(3).

No reasonable interpretation of the relevant statutory provisions can support the view that the Tribunal may award legal costs to successful complainants. Faced with a difficult point of statutory interpretation and conflicting judicial authority, the Tribunal adopted a dictionary meaning of "expenses" and articulated what it considered to be a beneficial policy outcome rather than engaging in an interpretative process taking account of the text, context and purpose of the provisions in issue. A liberal and purposive interpretation cannot supplant a textual and contextual analysis simply in order to give effect to a policy decision different from the one made by Parliament.

Cases Cited

Applied: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; **disapproved:** *Canada (Attorney General) v. Thwaites*, [1994] 3 F.C. 38; *Canada (Attorney General) v. Stevenson*, 2003 FCT 341, 229 F.T.R. 297; *Canada (Attorney General) v. Brooks*, 2006 FC 500, 291 F.T.R. 32; **referred to:** *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982; *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114; *Canada (Citizenship and Immigration) [page474] v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160; *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19, [2004] 1 S.C.R. 485; *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324; *Dickason v. University of Alberta*, [1992] 2 S.C.R. 1103; *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554; *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353; *Gould v. Yukon Order of Pioneers*, [1996] 1 S.C.R. 571; *Celgene Corp. v. Canada (Attorney General)*, 2011 SCC 1, [2011] 1 S.C.R. 3; *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39, [2009] 2 S.C.R. 678; *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650; *Lévis (City) v. Fraternité des policiers de Lévis Inc.*, 2007 SCC 14, [2007] 1 S.C.R. 591; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77; *Canadian Union of Public Employees, Local 963 v. New*

Brunswick Liquor Corp., [1979] 2 S.C.R. 227; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61; *Attorney General of Quebec v. Carrières Ste-Thérèse Ltée*, [1985] 1 S.C.R. 831; *Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771*, 2005 SCC 70, [2005] 3 S.C.R. 425; *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513; *Hilewitz v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 57, [2005] 2 S.C.R. 706; *Doré v. Verdun (City)*, [1997] 2 S.C.R. 862; *M. v. H.*, [1999] 2 S.C.R. 3; *Will-Kare Paving & Contracting Ltd. v. Canada*, 2000 SCC 36, [2000] 1 S.C.R. 915; *Harel v. Deputy Minister of Revenue of Quebec*, [1978] 1 S.C.R. 851; *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29; *Canada (Attorney General) v. Public Service Alliance of Canada*, [1991] 1 S.C.R. 614; *Morguard Properties Ltd. v. City of Winnipeg*, [1983] 2 S.C.R. 493; *Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40, [2009] 2 S.C.R. 764.

Statutes and Regulations Cited

Alberta Human Rights Act, R.S.A. 2000, c. A-25.5, s. 32(2).

An Act to amend the Canadian Human Rights Act and other Acts in consequence thereof, Bill C-108, 3 Sess., 34 Parl., 1991-92, ss. 21, 24(3).

An Act to extend the present laws in Canada that proscribe discrimination and that protect the privacy of individuals, Bill C-72, 1 Sess., 30 Parl., 1975, s. 37(4).

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Canadian Human Rights Act, R.S.C. 1985, c. H-6, ss. 7, 14, 51 [repl. 1998, c. 9, s. 27], 53 [*idem*].

Charter of human rights and freedoms, R.S.Q., c. C-12, s. 126.

Human Rights Act, R.S.P.E.I. 1988, c. H-12, s. 28.4(6).

Human Rights Act, S.N.W.T. 2002, c. 18, s. 63.

Human Rights Act, 2010, S.N.L. 2010, c. H-13.1, s. 39(2).

Human Rights Code, R.S.B.C. 1996, c. 210, s. 37(4).

Human Rights Code, S.M. 1987-88, c. 45, s. 45(2).

Saskatchewan Human Rights Code Regulations, R.R.S., c. S-24.1, Reg. 1, s. 21(1).

Statutory Powers Procedure Act, R.S.O. 1990, c. S.22, s. 17.1(2).

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Côté, Pierre-André, avec la collaboration de Stéphane Beaulac et Mathieu Devinat. *Interprétation des lois*, 4e éd. Montréal: Thémis, 2009.

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Garant, Patrice, avec la collaboration de Philippe Garant et Jérôme Garant. *Droit administratif*, 6e éd. Cowansville, Qué.: Yvon Blais, 2010.

Hawkins, Robert E. "Whither Judicial Review?" (2010), 88 *Can. Bar Rev.* 603.

Macklin, Audrey. "Standard of Review: The Pragmatic and Functional Test", in *Administrative Law in Context*, Colleen M. Flood and Lorne Sossin, eds. Toronto: Emond Montgomery, 2008, 197.

Sullivan, Ruth. *Sullivan on the Construction of Statutes*, 5 ed. Markham, Ont.: LexisNexis, 2008.

History and Disposition:

APPEAL from a judgment of the Federal Court of Appeal (Létourneau, Sexton and Layden-Stevenson JJ.A.), 2009 FCA 309, [2010] 4 F.C.R. 579, 312 D.L.R. (4) 294, 4 Admin. L.R. (5) 192, 395 N.R. 52, [2009] F.C.J. No. 1359 (QL), 2009 CarswellNat 3405, setting aside a decision of Mandamin J., 2008 FC 118, 322 F.T.R. 222, [page476] 78 Admin. L.R. (4) 127, [2008] F.C.J. No. 143 (QL), 2008 CarswellNat 200. Appeal dismissed.

Counsel:

Philippe Dufresne and *Daniel Poulin*, for the appellant the Canadian Human Rights Commission.

Andrew Raven, *Andrew Astritis* and *Bijon Roy*, for the appellant Donna Mowat.

Peter Southey and *Sean Gaudet*, for the respondent.

Reidar M. Mogerman, for the intervener the Canadian Bar Association.

David Baker and *Paul Champ*, for the intervener the Council of Canadians with Disabilities.

The judgment of the Court was delivered by

LeBEL and CROMWELL JJ.:--

I. Overview

1 The Canadian Human Rights Tribunal may order a person who has engaged in a discriminatory practice contrary to the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 ("*CHRA*" or "Act"), to compensate the victim for any lost wages, for all additional costs of obtaining alternative goods, services, facilities or accommodation, and "for any expenses incurred by the victim as a result of the discriminatory practice" (s. 53(2)). The main question before us is whether the Tribunal made a reviewable error in deciding that this power to order compensation for "any expenses incurred by the victim as a result of the discriminatory practice" permits it to order payment of all or a portion of the victim's legal costs.

2 The Tribunal's decision affirming this authority was reviewed by the Federal Court on the standard of reasonableness and upheld (2008 FC 118, 322 F.T.R. 222). However, the Federal Court of Appeal set aside the decision, holding that the proper standard of review was correctness and that the Tribunal's decision was incorrect (2009 FCA 309, [page477] [2010] 4 F.C.R. 579). The Court of Appeal also was of the view that even if the Tribunal's decision should be reviewed on the reasonableness standard, its decision was unreasonable.

3 Ms. Mowat did not participate at the Federal Court of Appeal but now appeals to this Court for reinstatement of the Tribunal's award. The Canadian Human Rights Commission, which was not a party before the Tribunal or Federal Court, and intervened before the Federal Court of Appeal, now joins Ms. Mowat as an appellant. (We will refer to Ms. Mowat as the appellant and to the Canadian Human Rights Commission as the Commission.)

4 The further appeal to this Court raises a threshold question of the appropriate standard of judicial review of the Tribunal's decision and the main question of whether the Tribunal made a reviewable error in finding that it had the authority to award legal costs. We would hold that the Tribunal's decision should be reviewed on the reasonableness standard but that its interpretation of this aspect of its remedial authority was unreasonable. We would therefore dismiss the appeal.

II. Background

5 The Canadian Forces compulsorily released the appellant, Ms. Mowat, in 1995, following a 14-year career as a traffic technician. Over the course of her time in the military, the appellant had made many formal complaints and grievances against members of her chain of command and others. Many of these were taken to the Chief of the Defence Staff, the highest level in Canadian Forces grievance resolution, and none was substantiated (2005 CHRT 31, 54 C.H.R.R. D/21 (the "merits decision"), at paras. 20, 81-82, 94, 143, 193, 207-8, 216, 218, 231, 236, 286, 294, 297 and 299). The Canadian Forces conducted an internal investigation into comments made by one of the appellant's co-workers which she alleged were sexually [page478] harassing. The investigation found that they were (para. 303). The recommendations from several reports on the incidents were implemented by the appellant's Commanding Officer and the employee responsible was disciplined (paras. 83-87).

6 However, in 1998, three years after leaving the Forces, the appellant filed a complaint with the Canadian Human Rights Commission alleging sexual harassment, adverse differential treatment, and failure to continue to employ her on account of her sex, pursuant to ss. 7 and 14 of the *CHRA*. The matter was ultimately heard before the Canadian Human Rights Tribunal.

III. Proceedings

A. *Canadian Human Rights Tribunal, 2005 CHRT 31, 54 C.H.R.R. D/21*

7 The hearing before the Tribunal occupied six weeks and the case record comprised more than 4,000 pages of transcript evidence and over 200 exhibits. The presiding Tribunal member, J. Grant Sinclair, was highly critical of the way in which the appellant Mowat conducted the proceedings. He observed that the complaint was "marked by a fundamental lack of precision in identifying the theory of the ... case" and referred to the allegations as a "conspiracy theory" and a "scatter-shot complaint with the allegations all over the place" (merits decision, at paras. 4, 357 and 408).

8 However, the presiding Tribunal member concluded that the appellant's complaint was substantiated in part. He found that her claim of sexual harassment, based on three comments made by a male co-worker, was substantiated and that the military's response had not been adequate or in accordance with its own policies (paras. 42, 47, 49 and 312-22). The rest of her complaint was dismissed.

[page479]

9 The Tribunal awarded $4,000 (plus interest, taking the award to the maximum of $5,000, the statutory limit at the time), to compensate the appellant for "suffering in respect of feelings or self-respect" (para. 7). It found that the version of the Act which was in force when Ms. Mowat filed her claim applied to the case, and substantial amendments made in 1998 should not apply retroactively (paras. 399-401). It then asked for further submissions regarding her claim for legal costs, which she indicated totalled more than $196,000. At issue was whether the Tribunal's

authority to award a complainant "any expenses incurred by the victim as a result of the discriminatory practice" under s. 53(2)(*c*) and (*d*) of the *CHRA* includes the authority to award legal costs.

10 In a separate decision, Member Sinclair reviewed the conflicting Federal Court jurisprudence and policy considerations favouring reimbursement and found that he was empowered to award legal costs (2006 CHRT 49 (CanLII) (the "costs decision")). Without recovery of legal costs, he found, any victory would be "pyrrhic" (para. 29). He then awarded $47,000 in partial satisfaction of Ms. Mowat's legal bills, an amount which he based on the volume of evidence for the substantiated sexual harassment allegation in comparison with the rest of the unsubstantiated complaints.

B. *Judicial Review - Federal Court of Canada, 2008 FC 118, 322 F.T.R. 222*

11 The Attorney General of Canada applied for judicial review of the costs decision; the appellant did not participate. Turning first to the standard of review, Mandamin J. applied the four factors from *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, and conducted a pragmatic and functional analysis to arrive at a reasonableness *simpliciter* standard. He classified the question as one of law, but noted that the Tribunal was engaged in interpretation of its home statute on a matter at the "core" of its expertise [page480] (para. 24). He also relied upon the "human rights policy approach to statutory interpretation" (para. 41), purportedly arising from this Court's decision in *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114, to ground his analysis and explain why a one-sided costs regime is permissible. This approach calls for a broad, purposive interpretation of the *CHRA*, commensurate with its remedial goals and special status. He then concluded that the Tribunal's decision about its authority to award costs was reasonable (para. 40). However, Mandamin J. found that the presiding Member had not adequately explained the quantification of the $47,000 award and that this constituted a breach of the principles of procedural fairness. The judicial review judge therefore quashed the decision and sent it back to the Tribunal on this ground. That aspect of the matter has not been appealed and it is not at issue before this Court.

C. *Federal Court of Appeal, 2009 FCA 309, [2010] 4 F.C.R. 579*

12 The Attorney General of Canada appealed the decision to the Federal Court of Appeal, which unanimously allowed the appeal and held that the Tribunal had no authority to make a costs award. Layden-Stevenson J.A. applied the standard of review principles enunciated by this Court in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, which had been released after the Federal Court hearing. She applied the correctness standard of review, based primarily on her conclusion that the issue was a question of law both outside the Tribunal's expertise and of central importance to the legal system (para. 42). The Tribunal's human rights expertise was not engaged by the issue, which instead required one clear and consistent answer (para. 47).

13 The Federal Court of Appeal went on to conclude that the Tribunal's decision to award legal

[page481] costs was incorrect. After a comprehensive review of the conflicting Tribunal and Federal Court jurisprudence, Layden-Stevenson J.A. turned to the legislative history of the provision in question. In her view, it evinced a clear Parliamentary intent to eschew a costs regime in favour of an active role for the Commission (paras. 65-67 and 88). She noted that the Commission itself, in a Special Report to Parliament, acknowledged that the *CHRA* did not allow for costs recovery (paras. 68 and 90). Further, "costs" is a legal term of art (para. 76), the power to award which must be derived from statute (para. 78). She also relied on a comparative analysis of comparable human rights statutes across Canada, many of which explicitly mention costs jurisdiction in addition to reimbursement of expenses (paras. 70-74 and 84-87). In conclusion, Layden-Stevenson J.A. found that policy considerations and a liberal and purposive approach to interpretation could not be used to override clear Parliamentary intent (paras. 99-100). She reasoned that the decision to provide the Tribunal with the power to award costs is a policy decision best left to Parliament (para. 101). She noted that even on a reasonableness standard, the Tribunal's award of legal costs should be set aside (para. 96).

IV. Analysis

A. *The Issues*

14 As noted, this appeal raises two issues:

1. What is the appropriate standard of review of the decision of the Tribunal as to the interpretation of its power to award legal costs under s. 53(2)(*c*) and (*d*) of the Act?
2. Did the Tribunal make a reviewable error in deciding that it could award compensation for legal costs?

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B. *The Dunsmuir Analysis*

15 In *Dunsmuir* and *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, the Court simplified an analytical approach that the judiciary found difficult to implement. Being of the view that the distinction between the standards of patent unreasonableness and reasonableness *simpliciter* was illusory, the majority in *Dunsmuir* eliminated the standard of patent unreasonableness. The majority thus concluded that there should be two standards of review: correctness and reasonableness.

16 *Dunsmuir* kept in place an analytical approach to determine the appropriate standard of review, the standard of review analysis. The two-step process in the standard of review analysis is first to "ascertain whether the jurisprudence has already determined in a satisfactory manner the

degree of deference to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review" (para. 62). The focus of the analysis remains on the nature of the issue that was before the tribunal under review (*Khosa*, at para. 4, *per* Binnie J.). The factors that a reviewing court has to consider in order to determine whether an administrative decision maker is entitled to deference are: the existence of a privative clause; a discrete and special administrative regime in which the decision maker has special expertise; and the nature of the question of law (*Dunsmuir*, at para. 55). *Dunsmuir* recognized that deference is generally appropriate where a tribunal is interpreting its own home statute or statutes that are closely connected to its function and with which the tribunal has particular familiarity. Deference may also be warranted where a tribunal has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context (*Dunsmuir*, at para. 54; *Khosa*, at para. 25).

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17 *Dunsmuir* nuanced the earlier jurisprudence in respect of privative clauses by recognizing that privative clauses, which had for a long time served to immunize administrative decisions from judicial review, may point to a standard of deference. But, their presence or absence is no longer determinative about whether deference is owed to the tribunal or not (*Dunsmuir*, at para. 52). In *Khosa*, the majority of this Court confirmed that with or without a privative clause, administrative decision makers are entitled to a measure of deference in matters that relate to their special role, function and expertise (paras. 25-26).

18 *Dunsmuir* recognized that the standard of correctness will continue to apply to constitutional questions, questions of law that are of central importance to the legal system as a whole and that are outside the adjudicator's expertise, as well as to "[q]uestions regarding the jurisdictional lines between two or more competing specialized tribunals" (paras. 58, 60-61; see also *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160, at para. 26, *per* Fish J.). The standard of correctness will also apply to true questions of jurisdiction or *vires*. In this respect, *Dunsmuir* expressly distanced itself from the extended definition of jurisdiction and restricted jurisdictional questions to those that require a tribunal to "explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter" (para. 59; see also *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19, [2004] 1 S.C.R. 485, at para. 5).

19 Having outlined the principles governing the judicial review analysis, we must now focus on how it should be applied to the decision of the Tribunal. As recommended by *Dunsmuir*, we must first consider how the existing jurisprudence has dealt with the decisions of the Tribunal and [page484] of similar bodies tasked with addressing human rights complaints. Over the years, a substantial body of case law about the standards of review of these decisions has developed.

Generally speaking, the reviewing courts have shown deference to the findings of fact of human rights tribunals (P. Garant, *Droit administratif* (6th ed. 2010), at p. 553). At the same time, they have granted little deference to their interpretations of laws, even of their own enabling statutes. It is well known that courts have traditionally extended deference to administrative bodies responsible for managing complex administrative schemes in domains like labour relations, telecommunications, the regulation of financial markets and international economic relations (*National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324, at pp. 1339 and 1341, *per* Wilson J., and pp. 1369-70, *per* Gonthier J.). On the other hand, reviewing courts have not shown deference to human rights tribunals in respect of their decisions on legal questions. In the courts' view, the tribunals' level of comparative expertise remained weak and the regimes that they administered were not particularly complex (see A. Macklin, "Standard of Review: The Pragmatic and Functional Test", in C. M. Flood and L. Sossin, eds., *Administrative Law in Context* (2008), 197, at p. 216).

20 Several examples can be found in the jurisprudence of the Court. In *Dickason v. University of Alberta*, [1992] 2 S.C.R. 1103, this Court held that absent a privative clause and specialized skill, a human rights commission or tribunal must interpret legislation correctly (pp. 1125-26). In subsequent decisions of this Court, the questions of whether the definition of "family status" as a prohibited ground of discrimination in the federal Act included same-sex couples (*Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554), or what constituted a "service customarily available to the public" or "public service" under the provincial [page485] human rights legislation (*University of British Columbia v. Berg*, [1993] 2 S.C.R. 353; *Gould v. Yukon Order of Pioneers*, [1996] 1 S.C.R. 571) were held to be questions of law in which human rights adjudicators had no particular expertise *vis-à-vis* the courts and which had to be reviewed under a standard of correctness.

21 But given the recent developments in the law of judicial review since *Dunsmuir* and its emphasis on the deference owed to administrative tribunals, even in respect of many questions of law, we must discuss whether all decisions on questions of law rendered by the Tribunal and similar bodies should be swept under the standard of correctness. At this point, we must acknowledge a degree of tension between some policies underpinning the present system of judicial review, when it applies to the decisions of human rights tribunals.

22 The nature of these tribunals lies at the root of these problems. On the one hand, *Dunsmuir* and *Khosa*, building upon previous jurisprudence, recognize that administrative tribunals are generally entitled to deference, in respect of the legal interpretation of their home statutes and laws or legal rules closely connected to them. On the other hand, our Court has reaffirmed that general questions of law that are both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise, must still be reviewed on a standard of correctness, in order to safeguard a basic consistency in the fundamental legal order of our country. The nature of the "home statute" administered by a human rights tribunal makes the task of resolving this tension a particularly delicate one. A key part of any human rights legislation in Canada consists of

principles and rules designed to combat discrimination. But, these statutes also include a large number of provisions, addressing issues like questions of proof and procedure or the [page486] remedial authority of human rights tribunals or commissions.

23 There is no doubt that the human rights tribunals are often called upon to address issues of very broad import. But, the same questions may arise before other adjudicative bodies, particularly the courts. In respect of some of these questions, the application of the *Dunsmuir* standard of review analysis could well lead to the application of the standard of correctness. But, not all questions of general law entrusted to the Tribunal rise to the level of issues of central importance to the legal system or fall outside the adjudicator's specialized area of expertise. Proper distinctions ought to be drawn, especially in respect of the issue that remains before our Court.

24 In this case, there is no doubt that the Tribunal has the power to award compensation for "any expenses incurred by the victim as a result of the discriminatory practice" pursuant to s. 53(2)(*c*) and (*d*) of the Act. The issue is whether the Tribunal could order the payment of costs as a form of compensation. Although *Dunsmuir* maintained the category of jurisdictional questions, it took the view that this category should be interpreted narrowly. Indeed, our Court has held since *Dunsmuir* that issues which in other days might have been considered by some to be jurisdictional, should now be dealt with under the standard of review analysis in order to determine whether a standard of correctness or of reasonableness should apply (see, e.g., *Celgene Corp. v. Canada (Attorney General)*, 2011 SCC 1, [2011] 1 S.C.R. 3, at paras. 33-34; *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39, [2009] 2 S.C.R. 678, at paras. 28-34). In substance, if the issue relates to the interpretation and application of its own statute, is within its expertise and does not raise issues of general legal importance, the standard of reasonableness will generally apply and the Tribunal will be entitled to deference.

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25 The question of costs is one of law located within the core function and expertise of the Tribunal relating to the interpretation and the application of its enabling statute (*Dunsmuir*, at para. 54). Although the respondent submitted that a human rights tribunal has no particular expertise in costs, care should be taken not to return to the formalism of the earlier decisions that attributed "a jurisdiction-limiting label, such as 'statutory interpretation' or 'human rights', to what is in reality a function assigned and properly exercised under the enabling legislation" by a tribunal (*Council of Canadians with Disabilities v. VIA Rail Canada Inc*., 2007 SCC 15, [2007] 1 S.C.R. 650, at para. 96, *per* Abella J.). The inquiry of what costs were incurred by the complainant as a result of a discriminatory practice is inextricably intertwined with the Tribunal's mandate and expertise to make factual findings relating to discrimination (see *Lévis (City) v. Fraternité des policiers de Lévis Inc.*, 2007 SCC 14, [2007] 1 S.C.R. 591, at para. 112, *per* Abella J., *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 76, *per* LeBel J.). As an administrative body

that makes such factual findings on a routine basis, the Tribunal is well positioned to consider questions relating to appropriate compensation under s. 53(2). In addition, a decision as to whether a particular tribunal will grant a particular type of compensation - in this case, legal costs - can hardly be said to be a question of central importance for the Canadian legal system and outside the specialized expertise of the adjudicator. Compensation is frequently awarded in various circumstances and under many schemes. It cannot be said that a decision on whether to grant legal costs as an element of that compensation and about their amount would subvert the legal system, even if a reviewing court found it to be in error.

26 Subjecting costs to a correctness review would represent a departure from *Dunsmuir*, and [page488] from this Court's recent decision in *Smith*. We note, though, that in that case there was a complex and substantial factual background. The issue was whether a tribunal with a mandate to arbitrate disputes relating to mandatory land expropriation and to award "legal, appraisal and other costs" could award costs of related proceedings which, in its view, had been necessary to secure compensation for the expropriation. Fish J., writing for the majority of this Court, concluded that the award of costs was reviewable on the standard of reasonableness since the tribunal was interpreting a provision of its home statute, and "[a]wards for costs are invariably fact-sensitive and generally discretionary" (para. 30). In his view, the tribunal's sole responsibility for determining the nature and the amount of costs was also grounded in the statutory language, and furthermore, involved an inquiry where the legal issues could not be easily separated from the factual issues (paras. 30-32). As the tribunal in *Smith*, the federal Tribunal in this case was interpreting a provision in its home statute that necessitated a fact-intensive inquiry and afforded the Tribunal a certain margin of discretion.

27 In summary, the issue of whether legal costs may be included in the Tribunal's compensation order is neither a question of jurisdiction, nor a question of law of central importance to the legal system as a whole and outside the Tribunal's area of expertise within the meaning of *Dunsmuir*. As such, the Tribunal's decision to award legal costs to the successful complainant is reviewable on the standard of reasonableness.

C. *Reasonableness of the Decision*

28 In *Dunsmuir*, the majority of this Court described reasonableness as

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> a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions.

> Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. [para. 47]

29 Reasonableness is therefore a deferential standard that shows respect for an administrative decision maker's experience and expertise. The concept of deference is fundamental in the context of judicial review, as this Court held in the seminal case of *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227. Deference to an administrative tribunal reflects recognition of interpretive choices. Such a recognition makes it possible to ask whether the tribunal or the court is better placed to make the choice (Macklin, at p. 205).

30 The concept of deference is also what distinguishes judicial review from appellate review. Although both judicial and appellate review take into account the principle of deference, care should be taken not to conflate the two. In the context of judicial review, deference can shield administrative decision makers from excessive judicial intervention even on certain questions of law as long as these questions are located within the decision makers' core function and expertise. In those cases, deference would therefore extend to protect a range of reasonable outcomes when the decision maker is interpreting its home statute (see R. E. Hawkins, "Whither Judicial Review?" (2010), 88 *Can. Bar Rev.* 603).

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31 By contrast, under the principles of appellate review set down in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, an appellate court owes no deference to a decision maker below on questions of law which are automatically reviewable on the standard of correctness. In *Khosa*, a majority of the Court confirmed that these principles of appellate review should not be imported into the judicial review context.

D. *Application - Reasonableness of Tribunal's Interpretation*

32 The Tribunal held that any authority to award legal costs must come from either s. 53(2)(*c*) or (*d*) of the Act (costs decision, at para. 11). The appellant and the Commission have not raised any other provisions capable of supporting the result sought and conceded during oral argument that they were relying on both provisions together. The precise interpretative question before the Tribunal, therefore, was whether the words of s. 53(2)(*c*) and (*d*), which authorize the Tribunal to "compensate the victim ... for any expenses incurred by the victim as a result of the discriminatory

practice", permit an award of legal costs. The Tribunal decided they did. However, in our view, this interpretation of these provisions is not reasonable, as a careful examination of the text, context and purpose of the provisions reveal.

33 The question is one of statutory interpretation and the object is to seek the intent of Parliament by reading the words of the provision in their entire context and according to their grammatical and ordinary sense, harmoniously with the scheme and object of the Act and the intention of Parliament (E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87, quoted in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21). In approaching this task in relation to human rights legislation, one must be mindful that it expresses fundamental values and pursues fundamental goals. It must therefore be interpreted liberally and purposively so that the rights enunciated are given their full recognition and effect: see, e.g., [page491] R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 497-500. However, what is required is nonetheless an interpretation of the text of the statute which respects the words chosen by Parliament.

34 The Tribunal based its conclusion that it had the authority to award legal costs on two points. First, following three decisions of the Federal Court, the Tribunal reasoned that the term "expenses incurred" in s. 53(2)(*c*) and (*d*) is wide enough to include legal costs: *Canada (Attorney General) v. Thwaites*, [1994] 3 F.C. 38, at p. 71; *Canada (Attorney General) v. Stevenson*, 2003 FCT 341, 229 F.T.R. 297, at paras. 23-26; *Canada (Attorney General) v. Brooks*, 2006 FC 500, 291 F.T.R. 32, paras. 10-16. Second, the Tribunal relied on what it considered to be compelling policy considerations relating to access to the human rights adjudication process. For reasons that we will set out, our view is that these points do not reasonably support the conclusion that the Tribunal may award legal costs. When one conducts a full contextual and purposive analysis of the provisions it becomes clear that no reasonable interpretation supports that conclusion.

(1) Text

35 Turning to the text of the provisions in issue, the words "any expenses incurred by the victim", taken on their own and divorced from their context, are wide enough to include legal costs. This was the view adopted by the Tribunal and the three Federal Court decisions on which it relied. However, when these words are read, as they must be, in their statutory context, it becomes clear that they cannot reasonably be interpreted as creating a stand-alone category of compensation capable of supporting any type of disbursement causally connected to the discrimination. The contention that they were in our view, ignores the structure of the provision in which the words "any expenses incurred by the victim" appear.

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36 For ease of reference, we reproduce s. 53(2) and (3) as they read at the time the appellant's complaint was filed:

53....

(2) If, at the conclusion of its inquiry, a Tribunal finds that the complaint to which the inquiry relates is substantiated, it may ... make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in that order any of the following terms that it considers appropriate:

(*a*) that the person cease the discriminatory practice and, in order to prevent the same or a similar practice from occurring in the future, take measures, including

(i) adoption of a special program, plan or arrangement referred to in subsection 16(1), or
(ii) the making of an application for approval and the implementing of a plan pursuant to section 17,

in consultation with the Commission on the general purposes of those measures;

(*b*) that the person make available to the victim of the discriminatory practice, on the first reasonable occasion, such rights, opportunities or privileges as, in the opinion of the Tribunal, are being or were denied the victim as a result of the practice;

(*c*) that the person compensate the victim, as the Tribunal may consider proper, for any or all of the wages that the victim was deprived of and for any expenses incurred by the victim as a result of the discriminatory practice; and

(*d*) that the person compensate the victim, as the Tribunal may consider proper, for any or all additional cost of obtaining alternative goods, services, facilities or accommodation and for any expenses incurred by the victim as a result of the discriminatory practice.

(3) In addition to any order that the Tribunal may make pursuant to

> subsection (2), if the Tribunal finds that
>
> > (*a*) a person is engaging or has engaged in a discriminatory practice wilfully or recklessly, or
>
> [page493]
>
> > (*b*) the victim of the discriminatory practice has suffered in respect of feelings or self-respect as a result of the practice,
>
> the Tribunal may order the person to pay such compensation to the victim, not exceeding five thousand dollars, as the Tribunal may determine.

37 It is significant, in our view, that the phrase "that the person compensate the victim ... for any expenses incurred by the victim as a result of the discriminatory practice" appears twice, in two subsequent paragraphs. The wording is identical, but on each occasion it appears, the reference to expenses is preceded by specific, but different, wording. The repetition of the reference to expenses and the context in which this occurs strongly suggest that the expenses referred to in each paragraph take their character from the sort of compensation contemplated by the surrounding words of each paragraph. So, in s. 53(2)(*c*), the person must compensate the victim for lost wages and any expenses incurred by the victim as a result of the discriminatory practice. In s. 53(2)(*d*), compensation is for the additional costs of obtaining alternate goods, services, facilities, or accommodation in addition to expenses incurred. If the use of the term "expenses" had been intended to confer a free-standing authority to confer costs in all types of complaints, it is difficult to understand why the grant of power is repeated in the specific contexts of lost wages and provision of services and also why the power to award expenses was not provided for in its own paragraph rather than being repeated in the two specific contexts in which it appears. This suggests that the term "expenses" is intended to mean something different in each of paragraphs (*c*) and (*d*).

38 The interpretation adopted by the Tribunal makes the repetition of the term "expenses" redundant and fails to explain why the term is linked to the particular types of compensation described in each of those paragraphs. This interpretation therefore violates the legislative presumption against tautology. As Professor Sullivan notes, at p. 210 of her text, "It is presumed that the legislature avoids superfluous or meaningless words, that it does not pointlessly repeat itself or speak in vain. Every [page494] word in a statute is presumed to make sense and to have a specific role to play in advancing the legislative purpose." As former Chief Justice Lamer put it in *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61, at para. 28, "It is a well accepted principle of statutory interpretation that no legislative provision should be interpreted so as to render it mere

surplusage." See also *Attorney General of Quebec v. Carrières Ste-Thérèse Ltée*, [1985] 1 S.C.R. 831, at p. 838.

39 The appellant received an award for pain and suffering under s. 53(3) of the *CHRA*. The Tribunal also expressly disallowed her medical expense claims (merits decision, at paras. 404-6). Unlike s. 53(2)(*c*) and (*d*), there is in subs. (3) no provision for the reimbursement of expenses. Once again, if the intention had been to grant free-standing authority to award costs, the meaning of this omission in light of the repeated specific provision for compensation for expenses is hard to fathom in the context of compensation for lost wages in paragraph (*c*) and for additional costs of obtaining goods and services in paragraph (*d*).

40 Moreover, the term "costs", in legal parlance, has a well-understood meaning that is distinct from either compensation or expenses. It is a legal term of art because it consists of "words or expressions that have through usage by legal professionals acquired a distinct legal meaning": Sullivan, at p. 57. Costs usually mean some sort of compensation for legal expenses and services incurred in the course of litigation. If Parliament intended to confer authority to order costs, it is difficult to understand why it did not use this very familiar and widely used legal term of art to implement that purpose. As we shall see shortly, the legislative history of the statute also strongly supports the inference that this was not Parliament's intent.

41 Finally, in relation to the text of the Act, it is noteworthy that it very strictly limits the [page495] amount of money the Tribunal may award for pain and suffering experienced as a result of the discriminatory practice and, as noted, does not explicitly provide for reimbursement of expenses in relation to such an award. At the time of these proceedings, the limit was $5,000. The Tribunal's interpretation permits it to make a free-standing award for pain and suffering coupled with an award of legal costs in a potentially unlimited amount. This view is hard to reconcile with either the monetary limit or the omission of any express authority to award expenses in s. 53(3).

(2) Context

42 Turning to context, three matters must be considered: legislative history, the Commission's own consistent understanding of the Tribunal's power to award costs, and parallel provincial and territorial legislation. These contextual matters, when considered along with the provisions' text and purpose, demonstrate that the Tribunal's interpretation does not fall within the range of reasonable interpretations of these provisions.

(a) *Legislative History*

43 The legislative evolution and history of a provision may often be important parts of the context to be examined as part of the modern approach to statutory interpretation: *Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771*, 2005 SCC 70, [2005] 3 S.C.R. 425, at para. 28, *per* Binnie J.; *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513, at p. 528, *per* L'Heureux-Dubé J.; *Hilewitz v. Canada (Minister of*

Citizenship and Immigration), 2005 SCC 57, [2005] 2 S.C.R. 706, at paras. 41-53, *per* Abella J. Legislative evolution consists of the provision's initial formulation and all subsequent formulations. Legislative history includes material relating to the conception, preparation and passage of the enactment: see Sullivan, at pp. 587-93; P.-A. Côté, with the collaboration of S. Beaulac and [page496] M. Devinat, *Interprétation des lois* (4th ed. 2009), at pp. 496 and 501-8.

44 We think there is no reason to exclude proposed, but unenacted, provisions to the extent they may shed light on the purpose of the legislation. While great care must be taken in deciding how much, if any, weight to give to these sorts of material, it may provide helpful information about the background and purpose of the legislation, and in some cases, may give direct evidence of legislative intent: Sullivan, at p. 609; Côté, at p. 507; *Doré v. Verdun (City)*, [1997] 2 S.C.R. 862, at para. 37. This Court, in *M. v. H.*, [1999] 2 S.C.R. 3, has held that failed legislative amendments can constitute evidence of Parliamentary purpose: paras. 348-49, *per* Bastarache J.

45 The legislative evolution and history of the *CHRA* shed light on two important matters. First, it strongly supports the inference that it is likely that Parliament would have chosen the familiar legal term of art had it been the intention to confer a power to award costs. Parliament is presumed to know the law and it is a reasonable inference that its failure to use familiar terms of art shows that some other meaning was intended. The history of the enactment of the provisions in issue supports applying that reasonable inference because the legal term of art "costs" was used in some draft provisions but not others. Second, the role envisioned for the Commission explains why the power to award costs was not part of Parliament's intent.

46 Before the *Canadian Human Rights Act* was enacted in 1977, there was an earlier attempt to enact similar legislation. In 1975, Bill C-72, *An Act to extend the present laws in Canada that proscribe discrimination and that protect the privacy of individuals*, 1st Sess., 30th Parl., received first reading. It provided a specific costs jurisdiction for the Tribunal *in addition to* authority to award expenses which was expressed in wording that was virtually identical to the current s. 53(2). Clause 37(4) of Bill C-72 read as follows:

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> **37....**
>
> (4) The costs of and incidental to any hearing before a Tribunal are in the discretion of the Tribunal, which may direct that the whole or any part thereof be paid by any party to such hearing.

47 Bill C-72 died on the order paper. When Bill C-25, which ultimately became the *CHRA* in

1977, was introduced, the explicit authority to award costs, which had been granted in cl. 37(4) of Bill C-72, was deleted, while the authority to award expenses was retained. In addition, a provision relating to the role of the Commission was inserted which we will discuss in a moment.

48 This piece of the legislative history of the provision before us strongly suggests that "costs" was used as a term of art when the intention was to confer authority to award legal costs. This view is further reinforced by amendments that were proposed, but not enacted, in 1992. Clause 24(3) of Bill C-108, *An Act to amend the Canadian Human Rights Act and other Acts in consequence thereof*, 3rd Sess., 34th Parl., 1991-92, provided that the Tribunal could order the Commission to pay costs. It read as follows:

> **24....**
>
> **(3) Subsections 53(3) and (4) of the said Act are repealed and the following substituted therefor:**
>
> ...
>
> (6) The Tribunal may order the Commission to pay costs in accordance with the rules made under section 48.9 to
>
> (*a*) a complainant, if the complaint is substantiated and
>
> (i) the Commission did not appear before the Tribunal, or
> (ii) separate representation for the complainant was warranted by the divergent interests of the complainant and the Commission or by any other circumstances of the complaint; or
>
> (*b*) a respondent, if the complaint is not substantiated and is found to be trivial, frivolous, vexatious, in bad faith or without purpose or to have caused the respondent excessive financial hardship.

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Clause 21 (adding s. 48.9(1)(*h*)) also would have allowed the Human Rights Tribunal Panel, with the approval of the Governor in Council, to make rules of procedure governing awards of interest and costs.

49 These provisions received first reading in December of 1992, but did not proceed further and were not enacted. However, they again show that the word "costs" was understood to be a legal term of art to be used when the intention was to confer authority to order payment of legal costs.

50 Another aspect of legislative history suggests that the authority to award costs and the role envisaged for the Commission were related subjects in Parliament's view.

51 We mentioned earlier that the 1975 draft bill which was not ultimately enacted expressly authorized the Tribunal to award "costs of and incidental to any hearing" before it. That express power, as we have noted, was not contained in the 1977 bill that ultimately became the *CHRA*. However, while the power to award costs was removed, a provision relating to the role of the Commission was added. This section currently reads:

> **51.** In appearing at a hearing, presenting evidence and making representations, the Commission shall adopt such position as, in its opinion, is in the public interest having regard to the nature of the complaint.

We agree with the respondent that the clear implication of this chain of events is that Parliament chose an active role for the Commission, which could include litigating on behalf of complainants, instead of cloaking the Tribunal with a broad costs jurisdiction.

52 The 1992 proposed amendments which we have noted earlier are consistent with this view. It is noteworthy that the authority to award costs contemplated by those provisions could only be [page499] awarded under this regime if the Commission did not take carriage of the matter. This supports the respondent's contention that an authority to award costs was rejected in favour of an active role for the Commission in presenting complaints to the Tribunal.

(b) *The Commission's Understanding of Costs Authority*

53 A further element of context is that the Commission itself has consistently understood that the *CHRA* does not confer jurisdiction to award costs and has repeatedly urged Parliament to amend the Act in this respect. Despite the limited weight of the factor, this Court has permitted consideration of an administrative body's own interpretation of its enabling legislation, for example, in *Will-Kare Paving & Contracting Ltd. v. Canada*, 2000 SCC 36, [2000] 1 S.C.R. 915. Binnie J. (in dissent) relied on excerpts from speeches to the Canadian Tax Foundation made by both the Minister of Finance and an employee of Revenue Canada when interpreting an income tax provision. Binnie J. states, "Administrative policy and interpretation are not determinative but are entitled to weight and can be an important factor in case of doubt about the meaning of legislation", at para. 66, citing *Harel v. Deputy Minister of Revenue of Quebec*, [1978] 1 S.C.R. 851, at p. 859, *per* de Grandpré J., and *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at p. 37, *per* Dickson J. (as he then was). While of course not conclusive, this sort of opinion about the proper interpretation of the provision may be consulted by the court provided it meets the threshold test of relevance and reliability (see Sullivan, at p. 575; Côté, at pp. 633-38). In my view, the considered and consistent view of the Commission

itself about the meaning of its constitutive statute meets these requirements.

54 In its 1985 annual report, the Commission asked that the Act be amended to empower the Tribunal to award costs:

[page500]

> *The Commission recommends to Parliament that the Canadian Human Rights Act be amended to include a provision to allow a human rights tribunal discretionary power to award costs to parties appearing before it.*
>
> The intent of this recommendation is to provide tribunals with a wider discretion in disposing of a complaint where undue hardship may be a factor.

(*Annual Report 1985* (1986), at p. 12 (italics in original))

The Commission made similar recommendations in each of its 1986, 1987, 1988, 1989 and 1990 annual reports to Parliament.

55 Most recently, in its *Special Report to Parliament: Freedom of Expression and Freedom from Hate in the Internet Age* (2009), the Commission stated that "[t]he CHRA does not allow for the awarding of costs" (p. 34). In this respect, the report makes mention of the simplified process that complainants must follow to file a complaint, and the assistance they get from both the Commission and the Tribunal during the investigation and litigation stages, as reasons why complainants do not need to hire lawyers to proceed. The Commission went on to recommend that Parliament amend the Act to allow discretion to award legal costs, but only if the Tribunal finds that one party has abused the Tribunal process.

56 While, as noted, the Commission's views about the limits of its statutory powers are not binding on the court, they may be considered. The Commission is the body charged with the administration and enforcement of the *CHRA* on a daily basis and possesses extensive knowledge of and familiarity with the Act. Its long-standing and consistently held view that the Act does not allow for costs, while not determinative, is entitled to some weight in the circumstances of this case.

(c) *Parallel Provincial and Territorial Legislation*

57 The respondent also urges us to consider parallel legislation in the provinces and territories [page501] and we agree that this is a useful exercise in this case. Of course, we do not suggest that consulting provincial and territorial legislation is always helpful to the task of discerning federal

legislative intent. However, Professor Sullivan confirms that cross-jurisdictional comparison of statutes dealing with the same subject matter may be instructive (pp. 419-20).

58 The Court has made use of parallel legislation as an interpretative aid in other cases. For example, in *Canada (Attorney General) v. Public Service Alliance of Canada*, [1991] 1 S.C.R. 614, Sopinka J. looked at several pieces of comparable provincial legislation to assist him in determining whether the federal legislation allowed the Public Service Staff Relations Board to decide who is an employee under its enabling legislation (pp. 631-32). Another example of this approach is found in *Morguard Properties Ltd. v. City of Winnipeg*, [1983] 2 S.C.R. 493, where Estey J. relied on a comparative analysis between Manitoba's legislation, and that of the other provinces, when deciding whether Winnipeg intended to freeze property tax assessments (pp. 504-5).

59 In this case, resort to parallel provincial and territorial legislation is helpful in one limited respect. It tends to confirm the view that the word "costs" is used consistently when the intention is to confer the authority to award legal costs.

60 For example, British Columbia allows costs to be awarded if there is "improper conduct" during the course of the complaint (*Human Rights Code*, R.S.B.C. 1996, c. 210, s. 37(4)). In Manitoba and the Northwest Territories, the conduct must be "frivolous or vexatious" (*Human Rights Code*, S.M. 1987-88, c. 45, s. 45(2); *Human Rights Act*, S.N.W.T. 2002, c. 18, s. 63). In Alberta, Prince Edward Island, and Newfoundland (*Alberta Human Rights Act*, R.S.A. 2000, c. A-25.5, s. 32(2); *Human Rights Act*, R.S.P.E.I. 1988, c. H-12, s. 28.4(6); *Human Rights Act, 2010*, S.N.L. 2010, c. H-13.1, s. 39(2)), tribunals can make any [page502] "appropriate" cost order, in Québec a tribunal may award costs "as it determines", *Charter of human rights and freedoms*, R.S.Q., c. C-12, s. 126; and in Saskatchewan it is any "appropriate" cost order but not against the Commission (*Saskatchewan Human Rights Code Regulations*, R.R.S., c. S-24.1, Reg. 1, s. 21(1)). In Ontario, the offending party's conduct must be "unreasonable, frivolous or vexatious or ... in bad faith" and the Tribunal can make its own rules pertaining to costs awards (*Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, s. 17.1(2)). In all provinces, this costs jurisdiction is *in addition to* broad compensatory jurisdiction for expenses incurred; the wording of these expense reimbursement provisions is very similar to the language of s. 53(2) of the *CHRA*.

(3) Purpose

61 The appellant urges the Court to give the provisions authorizing compensation for expenses a broad and purposive interpretation which will permit the Tribunal to make victims of discrimination whole. This was the second point relied on by the Tribunal in finding it could award costs.

62 As we noted earlier, the *CHRA* has been described as quasi-constitutional and deserves a broad, liberal, and purposive interpretation befitting of this special status. However, a liberal and purposive interpretation cannot supplant a textual and contextual analysis simply in order to give effect to a policy decision different from the one made by Parliament: *Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40, [2009] 2 S.C.R. 764, at paras. 49-50, *per* Abella J.; *Gould*

, at para. 50, *per* La Forest J., concurring.

[page503]

63 The genesis of this dispute appears to be the fact that, in 2003, the Commission decided to restrict its advocacy on behalf of complainants (R.F., at paras. 47-48). This policy change may have been in response to the Report of the Canadian Human Rights Act Review Panel, chaired by the Honourable Gérard La Forest, which recommended that the Commission act only in cases that raised serious issues of systemic discrimination or new points of law (*Promoting Equality: A New Vision* (2000)). Interestingly, this report also acknowledged that the *CHRA* does not provide any authority to award costs. The Report recommended clinic-type assistance to potential claimants (pp. 71-72 and 74-78). The latter recommendation was not acted upon, while the former was. As a result, the role of the Commission in taking complaints forward to the Tribunal was restricted without provision for alternative means to assist complainants to do so. Significantly, however, these changes occurred without changing the legislation in relation to the power to award costs.

64 In our view, the text, context and purpose of the legislation clearly show that there is no authority in the Tribunal to award legal costs and that there is no other reasonable interpretation of the relevant provisions. Faced with a difficult point of statutory interpretation and conflicting judicial authority, the Tribunal adopted a dictionary meaning of "expenses" and articulated what it considered to be a beneficial policy outcome rather than engage in an interpretative process taking account of the text, context and purpose of the provisions in issue. In our respectful view, this led the Tribunal to adopt an unreasonable interpretation of the provisions. The Court of Appeal was justified in reviewing and quashing the order of the Tribunal.

V. Disposition

65 We would dismiss the appeal without costs.

[page504]

Appeal dismissed.

Solicitors:

Solicitor for the appellant the Canadian Human Rights Commission: Canadian Human Rights Commission, Ottawa.

Solicitors for the appellant Donna Mowat: Raven, Cameron, Ballantyne & Yazbeck, Ottawa.

Solicitor for the respondent: Attorney General of Canada, Toronto.

Solicitors for the intervener the Canadian Bar Association: Camp Fiorante Matthews, Vancouver.

Solicitors for the intervener the Council of Canadians with Disabilities: Champ & Associates, Ottawa.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20140919

Docket: A-218-14

Citation: 2014 FCA 205

Present: **WEBB J.A.**

BETWEEN:

DR. GÁBOR LUKÁCS

Applicant

and

CANADIAN TRANSPORTATION AGENCY

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on September 19, 2014.

REASONS FOR ORDER BY: WEBB J.A.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20140919

Docket: A-218-14

Citation: 2014 FCA 205

Present: **WEBB J.A.**

BETWEEN:

DR. GÁBOR LUKÁCS

Applicant

and

CANADIAN TRANSPORTATION AGENCY

Respondent

REASONS FOR ORDER

WEBB J.A.

[1] Dr. Gábor Lukács, on April 22, 2014, commenced "an application for judicial review in respect of:

> (a) the practices of the Canadian Transport Agency ("Agency") related to the rights of the public, pursuant to the open-court principle, to view information provided in the course of adjudicative proceedings; and

(b) the refusal of the Agency to allow the Applicant to view unredacted documents in File No. M4120-3/13-05726 of the Agency, even though no confidentiality order has been sought or made in that file."

[2] The Agency brought a motion to quash this application for judicial review pursuant to paragraph 52(a) of the *Federal Courts Act*. This paragraph provides that:

52. The Federal Court of Appeal may	52. La Cour d'appel fédérale peut :
(a) quash proceedings in cases brought before it in which it has no jurisdiction or whenever those proceedings are not taken in good faith;	a) arrêter les procédures dans les causes qui ne sont pas de son ressort ou entachées de mauvaise foi;
…	[…]

[3] The Agency does not allege that the notice of application for judicial review was not taken in good faith but rather that this Court does not have the jurisdiction to hear this application. The grounds upon which the Agency relies are the following:

1. Subparagraph 28(1)(k) of the *Federal Courts Act* provides that it has jurisdiction to hear application for judicial review made in respect of decisions of the Agency.

2. A "refusal" to disclose government information, containing personal information such as in the present case for example, is a "refusal" of the head of the institution. It is therefore not a decision of the Agency falling within the purview of section 28 of the Federal Courts Act.

3. The application for judicial review should have been filed with the Federal Court.

4. Any person who has been refused access to a record requested under the Access to Information Act or a part thereof may, if a complaint has been made to the Information Commissioner in respect of the refusal, apply to the Federal Court for a review of the matter within the time specified in the Access to Information Act.

5. There are three prerequisites that must be met before an access requestor may apply for Judicial Review:

    1) The applicant must have been refused access to a record

    2) The applicant must have complained to the Information Commissioner

    3) The applicant must have received an investigation report by the Information Commissioner

6. The applicant could not apply for a judicial review because (1) the applicant's request was treated informally and there is therefore no “refusal”; (2) the applicant did not complain to the Information Commissioner before filing the within judicial review application; and (3) the applicant did not receive an investigation report by the Information Commissioner.

7. Even if the application for judicial review had been filed with the appropriate Court, it would have had no jurisdiction to obtain this application.

8. Such further and other grounds as counsel may advise and this Honourable Court may permit.

[4] In *Canada (Minister of National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250, [2013] F.C.J. No. 1155, Stratas J.A., writing on behalf of this Court, noted that:

> **(3)** Motions to strike notices of application for judicial review
>
> **47** The Court will strike a notice of application for judicial review only where it is "so clearly improper as to be bereft of any possibility of success": *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, [1995] 1 F.C. 588 at page 600 (C.A.). There must be a "show stopper" or a "knockout punch" - an obvious, fatal flaw striking at the root of this Court's power to entertain the application: *Rahman v. Public Service Labour Relations Board*, 2013 FCA 117 at paragraph 7; *Donaldson v. Western Grain Storage By-Products*, 2012 FCA 286 at paragraph 6; *cf..Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959.
>
> **48** There are two justifications for such a high threshold. First, the Federal Courts' jurisdiction to strike a notice of application is founded not in the Rules but in the Courts' plenary jurisdiction to restrain the misuse or abuse of courts' processes: *David Bull*, *supra* at page 600; *Canada (National Revenue) v. RBC Life Insurance Company*, 2013 FCA 50. Second, applications for judicial review must be brought quickly and must proceed "without delay" and "in a summary way": *Federal Courts Act*, *supra*, subsection 18.1(2) and section 18.4. An unmeritorious motion - one that raises matters that should be advanced at the hearing on the merits - frustrates that objective.

[5] In this case the Agency is relying on the authority provided in section 52 of the *Federal Courts Act* to strike the notice of application for judicial review. However, the comments of Stratas J. that an application for judicial review will only be struck if the application is “so clearly improper as to be bereft of any possibility of success" are equally applicable in this case. In *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, [1995] 1 F.C. 588, this Court also

noted that a reason for such a high threshold is the difference between an action and an application for judicial review. As stated in paragraph 10:

> … An action involves, once the pleadings are filed, discovery of documents, examinations for discovery, and then trials with viva voce evidence. It is obviously important that parties not be put to the delay and expense involved in taking a matter to trial if it is "plain and obvious" (the test for striking out pleadings) that the pleading in question cannot amount to a cause of action or a defence to a cause of action…
>
> Further, the disposition of an application commenced by originating notice of motion does not involve discovery and trial, matters which can be avoided in actions by a decision to strike. In fact, the disposition of an originating notice proceeds in much the same way that an application to strike the notice of motion would proceed: on the basis of affidavit evidence and argument before a single judge of the Court. Thus, the direct and proper way to contest an originating notice of motion which the Agency thinks to be without merit is to appear and argue at the hearing of the motion itself…

[6] Therefore, there is a high threshold for the Agency to succeed in this motion to quash the application for judicial review.

[7] The first three grounds for quashing the application for judicial review identified by the Agency can be consolidated and summarized as a submission that there is no decision of the Agency and that this Court only has the jurisdiction under subparagraph 28(1)(k) of the *Federal Courts Act* to judicially review decisions of the Agency.

[8] Subparagraph 28(1)(k) of the *Federal Courts Act* provides that:

28. (1) The Federal Court of Appeal has jurisdiction to hear and determine applications for judicial review made in respect of any of the following federal boards, commissions or other tribunals:	28. (1) La Cour d'appel fédérale a compétence pour connaître des demandes de contrôle judiciaire visant les offices fédéraux suivants :
…	[…]

(k) the Canadian Transportation Agency established by the Canada Transportation Act;	k) l'Office des transports du Canada constitué par la Loi sur les transports au Canada;

[9] There is nothing in subsection 28(1) to suggest that an application for judicial review can only be made to this Court if there is a decision of the Agency.

[10] In *Air Canada v. Toronto Port Authority*, 2011 FCA 347, [2011] F.C.J. No. 1725, Stratas J.A. stated that:

> **23** Although the Federal Court judge and the parties focused on whether a "decision" or "order" was present, I do not take them to be saying that there has to be a "decision" or an "order" before any sort of judicial review can be brought. That would be incorrect.
>
> **24** Subsection 18.1(1) of the *Federal Courts Act* provides that an application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by "the matter in respect of which relief is sought." A "matter" that can be subject of judicial review includes not only a "decision or order," but any matter in respect of which a remedy may be available under section 18 of the *Federal Courts Act*: *Krause v. Canada*, [1999] 2 F.C. 476 (C.A.). Subsection 18.1(3) sheds further light on this, referring to relief for an "act or thing," a failure, refusal or delay to do an "act or thing," a "decision," an "order" and a "proceeding." Finally, the rules that govern applications for judicial review apply to "applications for judicial review of administrative action," not just applications for judicial review of "decisions or orders": Rule 300 of the *Federal Courts Rules*.
>
> **25** As far as "decisions" or "orders" are concerned, the only requirement is that any application for judicial review of them must be made within 30 days after they were first communicated: subsection 18.1(2) of the *Federal Courts Act*.

[11] Subsection 28(2) of the *Federal Courts Act* provides that section 18 to 18.5 (except subsection 18.4(2)) apply to any matter within the jurisdiction of this Court. Therefore, a decision is not necessarily required in order for this Court to have jurisdiction under section 28 of the *Federal Courts Act*.

[12] The other grounds that are submitted for quashing the notice of application are related to the *Access to Information Act*, R.S.C., 1985, c. A-1. It is acknowledged by both Dr. Lukács and the Agency that Dr. Lukács did not submit a request for information under this *Act.* Section 41 of that *Act* would only apply if the conditions as set out in that section were satisfied. Since he did not submit a request under that *Act*, the conditions of this section are not satisfied.

[13] However, the argument of Dr. Lukács is that he has the right to the documents in question without having to submit a request for these under the *Access to Information Act*. The Agency did not refer to any provision of the *Access to Information Act* that provides that the only right to obtain information from the Agency is by submitting a request under that *Act*.

[14] The issue on this motion is not whether Dr. Lukács will be successful in this argument but rather whether his application is "so clearly improper as to be bereft of any possibility of success". I am not satisfied that the Agency has met this high threshold in this case. I agree with the comments of this Court in *David Bull Laboratories (Canada) Inc.* that "the direct and proper way to contest a [notice of application for judicial review] which the Agency thinks to be without merit is to appear and argue at the hearing of the [application] itself".

[15] The Agency's motion to quash the notice of application for judicial review in this matter is dismissed, with costs, payable in any event of the cause.

"Wyman W. Webb"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-218-14
STYLE OF CAUSE:	DR. GABOR LUKACS v. CANADIAN TRANSPORTATION AGENCY

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	WEBB J.A.
DATED:	SEPTEMBER 19, 2014

WRITTEN REPRESENTATIONS BY:

Self-represented	FOR THE APPLICANT
Odette Lalumière	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Self-represented	FOR THE APPLICANT
Legal Services Branch Canadian Transportation Agency	FOR THE RESPONDENT

Case Name:

Lukacs v. Canada (Canadian Transportation Agency)

Between
Dr. Gabor Lukacs, Applicant, and
Canadian Transportation Agency et al., Respondents, and
The Privacy Commissioner of Canada, Intervener, and
The Attorney General of Canada, Intervener

[2015] F.C.J. No. 707

[2015] A.C.F. no 707

2015 FCA 140

253 A.C.W.S. (3d) 751

386 D.L.R. (4th) 163

2015 CarswellNat 1893

88 Admin. L.R. (5th) 24

473 N.R. 263

Docket: A-218-14

Federal Court of Appeal
Halifax, Nova Scotia

Ryer, Near and Boivin JJ.A.

Heard: March 17, 2015.
Judgment: June 5, 2015.

(82 paras.)

Government law -- Access to information and privacy -- Access to information -- Inspection of public documents -- Redaction or summation prior to disclosure -- Bars and grounds for refusal -- Protected personal information -- Application by transport passenger advocate for review of

Agency's refusal to provide unredacted copy of public record allowed -- Record related to family's complaint about delayed flight and request for compensation -- Once record of proceedings before Agency placed in public record, it became subject to production to members of public -- Open court principle applied -- Privacy Act, ss. 2, 3, 4, 7, 8, 69.

Transportation law -- Air transportation -- Regulation -- Federal -- Complaints about air carriers -- Canadian Transportation Agency -- Application by transport passenger advocate for review of Agency's refusal to provide unredacted copy of public record allowed -- Record related to family's complaint about delayed flight and request for compensation -- Once record of proceedings before Agency placed in public record, it became subject to production to members of public -- Open court principle applied -- Canadian Transportation Agency Rules, Rules 7, 31.

Application by Lukacs for judicial review of the Canadian Transportation Agency's refusal of his request for an unredacted copy of materials the Agency placed on its public record in a dispute resolution proceeding between Air Canada and a family whose flight from Vancouver to Cancun was delayed. Lukacs was an air transportation passenger advocate. He sought copies of all public documents filed with the Agency in relation to the family's claim for compensation for denied boarding and costs. The Agency asserted that it was bound by the provisions of the Privacy Act to remove personal information from its public record prior to providing a copy to Lukacs.

HELD: Application allowed. The Agency's status as a specialized tribunal did not warrant a divergence from the open court principle. The public record of the proceedings before the tribunal relating to the family's complaint was subject to production in response to a request from a member of the public.

Statutes, Regulations and Rules Cited:

Canada Transportation Act, S.C. 1996, c. 10, s. 6, s. 17, s. 25, s. 35

Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, s. 1, s. 2(b)

Canadian Transportation Agency General Rules, SOR/2005-35, Rule 23(1), Rule 23(3), Rule 23(4), Rule 23(9)

Canadian Transportation Agency Rules (Dispute Proceedings at Certain Rules Applicable to All Proceedings), SOR/2014-104, Rule 7, Rule 7(2), Rule 31

Federal Courts Rules, SOR/98-106, Rule 151, Rule 151(2), Rule 152

Privacy Act, R.S.C. 1985, c. P-21, s. 2, s. 3, s. 4, s. 7, s. 7(a), s. 7(b), s. 8, s. 8(1), s. 8(2), s. 8(2)(a), s. 8(2)(b), s. 8(2)(m), s. 8(2)(m)(i), s. 69(2)

Counsel:

Dr. Gabor Lukacs, on his own behalf.

Allan Matte, for the Respondent.

Jennifer Seligy, Steven J. Welchner, for the Intervener.

Melissa Chan, for the Attorney General of Canada.

REASONS FOR JUDGMENT

The judgment of the Court was delivered by

1 RYER J.A.:-- Dr. Gabor Lukacs is a Canadian air passenger rights advocate. He brings this application for judicial review of a decision of the Canadian Transportation Agency (the "Agency") to refuse his request for an unredacted copy of the materials that the Agency placed on its public record in a dispute resolution proceeding between Air Canada and a family whose flight from Vancouver to Cancun had been delayed (the "Cancun Matter").

2 The Agency is constituted under the *Canada Transportation Act*, S.C. 1996, c.10 (the "CTA"). The jurisdiction of the Agency is broad, encompassing economic regulatory matters in relation to air, rail and marine transportation in Canada, and adjudicative decision-making in respect of disputes that arise in areas under its jurisdiction.

3 When engaged in adjudicative dispute resolution, the Agency acts in a quasi-judicial capacity, functioning in many respects like a court of law, and members of the Agency, as defined in section 6 of the CTA, function like judges, in many respects.

4 Adjudicative proceedings before a court of law are subject to the open court principle, which generally requires that such proceedings, the materials in the record before the court and the resulting decision must be open and available for public scrutiny, except to the extent that the court otherwise orders.

5 These rights of access to court proceedings, documents and decisions are grounded in common law, as an element of the rule of law, and in the Constitution, as an element of the protection accorded to free expression by s.2(*b*) of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982 c. 11 (the "*Charter*").

6 Court-sanctioned limitations on the rights arising from the open court principle are often

imposed under the procedural rules applicable to the court. In the context of the *Charter*, the appropriateness of requested limitations to the open court principle are determined under a judge-made test requiring the court to consider whether the salutary effects of the requested limitation on the administration of justice outweighs the deleterious effects of that limitation.

7 In responding to Dr. Lukacs' request for the materials on its public record in the Cancun Matter, the Agency acknowledged that it was subject to the open court principle. However, the Agency asserted that, unlike courts of law, the application of that principle to the Agency s public record was circumscribed by the provisions of the *Privacy Act*, R.S.C., 1985, c. P-21 (the *"Privacy Act"*). Thus, before providing the materials to Dr. Lukacs, one of the Agency's administrative employees removed portions of them that she determined to contain personal information ("Personal Information"), as defined in section 3 of the *Privacy Act*.

8 The Agency refused Dr. Lukacs' further request for a copy of the unredacted material on its public record, asserting that subsection 8(1) of the *Privacy Act* prevented it from disclosing Personal Information under its control.

9 Dr. Lukacs brought this application for judicial review challenging the Agency's refusal to provide the unredacted materials on a number of bases. Among his arguments, he asserted that because the requested materials had been placed on the Agency's public record ("Public Record") in accordance with subsection 23(1) of the *Canadian Transportation Agency General Rules*, SOR/2005-35 (the "Old Rules"), all of those materials -- in an unredacted form -- were publicly available ("Publicly Available") within the meaning of subsection 69(2) of the *Privacy Act*, and, as such, the prohibition on disclosure in subsection 8(1) of the *Privacy Act* does not apply to his request.

10 In my view, this argument is persuasive and, accordingly, the Agency's refusal to provide an unredacted copy of the requested materials to Dr. Lukacs is impermissible.

I. BACKGROUND

11 The Agency's decision in the Cancun Matter (Decision 55-C-A-2014) dealt with a claim for compensation for denied boarding and costs from flight delays that was made by a family in relation to a flight from Vancouver to Cancun, Mexico.

12 On February 14, 2014, Dr. Lukacs made a request to the Secretary of the Agency for a copy of all of the public documents that were filed with the Agency in the Cancun Matter.

13 On February 24, 2014, Ms. Patrice Bellerose, a staff employee of the Agency, sent an email to Dr. Lukacs indicating that the Agency would provide the Public Record as soon as they could do so.

14 On March 19, 2014, Ms. Bellerose sent an email to Dr. Lukacs that contained a copy of the materials that had been filed, but portions of those materials were redacted.

15 Ms. Bellerose made the redactions on the basis that section 8 of the *Privacy Act* prevented the Agency from disclosing what she determined to be Personal Information contained in the materials that the Agency placed on its Public Record. Importantly, none of the materials filed in the Cancun Matter was subject to a confidentiality order, which the Agency was empowered to make, pursuant to subsections 23(4) to (9) of the Old Rules, upon request from any person who files a document in any given proceeding.

16 On March 24, 2014, Dr. Lukacs wrote to the Secretary of the Agency requesting "unredacted copies of all documents in File No. M4120-3/13-05726 with respect to which no confidentiality order was made by a member of the Agency."

17 On March 26, 2014, Mr. Geoffrey C. Hare, Chairperson and CEO of the Agency, wrote to Dr. Lukacs and, without specifically so stating, refused (the "Refusal") to accede to Dr. Lukacs' request for unredacted copies of the materials (the "Unredacted Materials") in the Cancun Matter.

18 On April 22, 2014, Dr. Lukacs brought this application for judicial review in respect of the Agency's practice of limiting public access to Personal Information in documents filed in the Agency's adjudicative proceedings, specifically challenging the refusal of the Agency to provide him with the Unredacted Materials.

19 The relief sought by Dr. Lukacs is as follows:

1. a declaration that adjudicative proceedings before the Canadian Transportation Agency are subject to the constitutionally protected open-court principle;

2. a declaration that all information, including but not limited to documents and submissions, provided to the Canadian Transportation Agency in the course of adjudicative proceedings are part of the public record in their entirety, unless confidentiality was sought and granted in accordance with the Agency's *General Rules*;

3. a declaration that members of the public are now entitled to view all information, including but not limited to documents and submissions, provided to the Canadian Transportation Agency in the course of adjudicative proceedings, unless confidentiality was sought and granted in accordance with the Agency's *General Rules*;

4. a declaration that information provided to the Canadian Transportation Agency in the course of adjudicative proceedings fall within the exceptions

of subsections 69(2) and/or 8(2)(*b*) and/or 8(2)(*m*) of the *Privacy Act*, R.S.C. 1985, c. P-21;

5. in the alternative, a declaration that provisions of the *Privacy Act*, R.S.C. 1985, c. P-21 are inapplicable with respect to information, including but not limited to documents and submissions, provided to the Canadian Transportation Agency in the course of adjudicative proceedings to the extent that these provisions limit the rights of the public to view such information pursuant to subsection 2(*b*) of the *Canadian Charter of Rights and Freedoms*;

6. a declaration that the power to determine questions related to confidentiality of information provided in the course of adjudicative proceedings before the Canadian Transportation Agency is reserved to Members of the Agency, and cannot be delegated to Agency Staff;

7. an order of *mandamus* directing the Canadian Transportation Agency to provide the Applicant with unredacted copies of the documents in File No. M4120-3/13-05726, or otherwise allow the Applicant and/or others on his behalf to view unredacted copies of these documents;

8. costs and/or reasonable out-of-pocket expenses of this application;

9. such further and other relief or directions as the Applicant may request and this Honourable Court deems just.

20 By order dated December 10, 2014, Stratas J.A. granted the Privacy Commissioner of Canada (the "Privacy Commissioner") leave to intervene in this application on the basis that the application raises issues as to whether certain provisions of the *Privacy Act* provide justification for the Refusal.

21 On November 21, 2014, Dr. Lukacs filed a Notice of Constitutional Question in which he challenged the constitutional validity of certain provisions of the *Privacy Act*. Dr. Lukacs contends that he has a constitutional right under the open court principle, protected by paragraph 2(b) of the *Charter*, to obtain the Unredacted Documents. He submitted that, if any provisions of the *Privacy Act* limit his right to obtain such documents, those provisions infringe paragraph 2(b) of the *Charter*. Further, Dr. Luk cs argues that any infringement is not saved under section 1 of the *Charter*.

22 On March 5, 2015, the Attorney General of Canada filed a Memorandum of Fact and Law and became a party to this application.

II. THE REFUSAL

23 In the Refusal, Chairperson Hare stated that the Agency is a government institution ("Government Institution"), as defined under section 3 of the *Privacy Act*, that is subject to the full application of that legislation. He then referred to sections 8, 10 and 11 of the *Privacy Act* and stated that:

> The purpose of the Act is to protect the privacy of individuals with respect to personal information about themselves held by a government institution. Section 8 of the Act is clear that, except for specific exceptions found in that section, personal information under the control of a government institution shall not, without the consent of the individual to whom it relates, be disclosed by the institution. Also, in accordance with sections 10 and 11 of the Act, personal information under the control of a government institution such as the Agency must be accounted for in either personal information banks or classes of personal information. Because there are no provisions in the Act that grant to government institutions that are subject to the Act, the discretion not to apply those provisions of the Act, personal information under the control of the Agency is not disclosed without the consent of the individual and are accounted for either in personal information banks or classes of personal information and consequently published in InfoSource. This is all consistent with the directions of the Treasury Board Canada Secretariat.
>
> Although Agency case files are available to the public for consultation in accordance with the open court principle, personal information contained in the files such as an individual's home address, personal email address, personal phone number, date of birth, financial details, social insurance number, driver's licence number, or credit card or passport details, is not available for consultation.
>
> The file you requested has such sensitive personal information and it has therefore been removed by the Agency as required under the Act.

24 While these reasons do not explicitly so state, it is apparent to me that the Agency concluded that subsection 8(1) of the *Privacy Act* circumscribes the scope and ambit of the open court principle. Thus, the Agency concluded that subsection 8(1) of the *Privacy Act* requires it to redact Personal Information contained in documents placed on its Public Record in dispute resolution proceedings before such documents can be disclosed to a member of the public who requests them.

25 Chairperson Hare's reasons do not explain why any of the disclosure-permissive provisions in the *Privacy Act*, such as paragraphs 8(2)(*a*), (*b*) or (*m*), are inapplicable to Dr. Lukacs' request. Additionally, his reasons do not discuss whether the Personal Information that the Agency redacted, in intended compliance with the non-disclosure requirement in subsection 8(1) of the *Privacy Act*, was Publicly Available.

III. ISSUES

26 This appeal raises two general issues:

(a) whether subsection 8(1) of the *Privacy Act* requires or permits the Agency to refuse to provide the Unredacted Materials to Dr. Lukacs (the "Refusal Issue"); and

(b) if the answer to the first issue is in the affirmative, whether subsection 8(1) of the *Privacy Act* infringes upon Dr. Lukacs' rights under paragraph 2(*b*) of the *Charter* (the "Constitutional Issue").

IV. ANALYSIS

A. Introduction

The open court principle

27 I will begin this analysis by considering what is meant by the open court principle. In the words of Chief Justice McLachlin in her speech "Openness and the Rule of Law" (Annual International Rule of Law Lecture, delivered in London, United Kingdom, 8 January 2014), at page 3:

> The open court principle can be reduced to two fundamental propositions. First, court proceedings, including the evidence and documents tendered, are open to the public. Second, juries give their verdicts and judges deliver their judgments in public or in published form.
>
> [Emphasis added]

28 It is the first aspect of this formulation that is presently in issue. More particularly, the issue under consideration relates to disclosure of documents that were on the Agency's Public Record and formed the basis for its decision in the Cancun Matter.

29 The open court principle has been recognized for over a century, as noted by the Supreme

Court in *Named Person v. Vancouver Sun*, 2007 SCC 43, [2007] 3 S.C.R. 253 at paragraph 31. In that case, Bastarache J. stated at paragraph 33:

> In addition to its longstanding role as a common law rule required by the rule of law, the open court principle gains importance from its clear association with free expression protected by s. 2(*b*) of the Charter. In the context of this appeal, it is important to note that s. 2(*b*) provides that the state must not interfere with an individual's ability to "inspect and copy public records and documents, including judicial records and documents (*Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, at 1328, citing *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978), at p. 597). La Forest J. adds at para. 24 of [*Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480]: "[e] ssential to the freedom of the press to provide information to the public is the ability of the press to have access to this information" (emphasis added). Section 2(*b*) also protects the ability of the press to have access to court proceedings (*CBC*, at para. 23; *Ruby v. Canada (Solicitor General)*, [2002] 4 S.C.R. 3, 2002 SCC 75, at para. 53).
>
> [Emphasis added]

30 Thus, where the open court principle is unrestricted in its application, a member of the public has a common law and perhaps a constitutional right to inspect and copy all documents that have been placed on the record that is or was before a court.

31 An important consideration is whether there are any limits on the extent of the application of the open court principle. Clearly, there are.

32 In *Nova Scotia (Attorney General) v. MacIntyre*, [1982] 1 S.C.R. 175, 132 D.L.R. (3d) 385, Dickson J., as he then was, stated at page 189:

> Undoubtedly every court has a supervisory and protecting power over its own records. Access can be denied when the ends of justice would be subverted by disclosure or the judicial documents might be used for an improper purpose. The presumption, however, is in favour of public access and the burden of contrary proof lies upon the person who would deny the exercise of the right.

33 In the context of access to documents, courts generally have procedural rules that permit the filing of documents on a confidential basis where an order to that effect is obtained. For example, sections 151 and 152 of the *Federal Courts Rules*, SOR/98-106 set out a scheme for claiming confidentiality with respect to materials filed in proceedings before the Federal Court and this Court. Importantly, subsection 151(2) of those Rules stipulates that before a confidentiality order can be made, the Court must be satisfied that the material should be treated as confidential,

notwithstanding the public interest in open and accessible court proceedings. Thus, both the Federal Court and this Court are empowered to circumscribe the open court principle in appropriate circumstances.

34 More broadly, limitations on the application of the open court principle have been challenged, in a number of circumstances, on the basis that they infringe upon rights protected under s 2(*b*) of the *Charter*. For example:

(a) A time-limited publication ban to protect the identity of undercover police officers was upheld, but a publication ban on police operational methods was found to be unnecessary (*R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442);

(b) In connection with the construction and sale of two nuclear reactors by a Crown corporation to China, the Supreme Court granted a confidentiality order with respect to an affidavit that contained sensitive technical information about the ongoing environmental assessment of the construction site by Chinese authorities (*Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522);

(c) A request for a blanket sealing order with respect to search warrants and supporting information was denied because the party seeking the order failed to show a serious and specific risk to the integrity of a criminal investigation, but editing of the materials was permitted to protect the identity of a confidential informant (*Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188);

(d) A request for a publication ban prohibiting a newspaper from reporting on settlement negotiations between the federal government and a company with respect to the recovery of public funds in connection with the federal "Sponsorship Program" was denied on the basis that the settlement negotiations were already a matter of public record and a publication ban would stifle the media's exercise of their constitutionally-mandated role to report stories of public interest (*Globe and Mail v. Canada (Attorney General)*, 2010 SCC 41, [2010] 2 S.C.R. 592); and

(e) A teenage girl, who was seeking an order to compel disclosure by an internet service provider of information relating to cyber-bullying, was granted permission to proceed anonymously, but a publication ban on

> those parts of the internet materials that did not identify the girl was denied (*A.B. v. Bragg Communications Inc.*, 2012 SCC 46, [2012] 2 S.C.R. 567).

35 In determining whether or not it was appropriate to limit the application of the open court principle in each of these matters, the courts adopted the approach taken by the Supreme Court in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, 120 D.L.R. (4th) 12 and *Mentuck* (the so-called *Dagenais/Mentuck* test). This test was described in *Toronto Star Newspapers*, at paragraph 4, as follows:

> Competing claims related to court proceedings necessarily involve an exercise in judicial discretion. It is now well established that court proceedings are presumptively "open" in Canada. Public access will be barred only when the appropriate court, in the exercise of its discretion, concludes that disclosure would *subvert the ends of justice or unduly impair its proper administration.*

Stated another way, the test is whether the salutary effects of the requested limitation of the open court principle will outweigh the deleterious effects of that limitation.

36 Another important consideration is whether the open court principle applies only to courts or whether it also applies to quasi-judicial tribunals.

> *The Agency and the Open Court Principle*

37 In this application, all parties are agreed that the open court principle applies to the Agency when it undertakes dispute resolution proceedings in its capacity as a quasi-judicial tribunal. Support for this proposition can be found in *R. v. Canadian Broadcasting Corporation*, 2010 ONCA 726, 327 D.L.R. (4th) 470, at paragraph 22, where Sharpe J.A. stated:

> [22] The open court principle, permitting public access to information about the courts, is deeply rooted in the Canadian system of justice. The strong public policy in favour of openness and of "maximum accountability and accessibility" in respect of judicial or quasi-judicial acts pre-dates the Charter: *Nova Scotia (Attorney General) v. MacIntyre*, [1982] 1 S.C.R. 175, [1982] S.C.J. No. 1, at p. 184 S.C.R. As Dickson J. stated, at pp. 186-87 S.C.R.: At every stage the rule should be one of public accessibility and concomitant judicial accountability" and "curtailment of public accessibility can only be justified where there is present the need to protect social values of superordinate importance".
>
> [Emphasis added]

However, the Agency asserts that it is nonetheless obliged to first apply section 8 of the *Privacy Act* before it can give effect to the open court principle. This assertion necessitates a consideration of

both the *Privacy Act* and the particular circumstances of the Agency.

The Privacy Act

38 Section 2 of the *Privacy Act* contains Parliament's stipulation as to its purpose. That provision reads as follows:

> *Purpose*
>
> 2. The purpose of this Act is to extend the present laws of Canada that protect the privacy of individuals with respect to personal information about themselves held by a government institution and that provide individuals with a right of access to that information.
>
> * * *
>
> *Object*
>
> 2. La présente loi a pour objet de compléter la législation canadienne en matière de protection des renseignements personnels relevant des institutions fédérales et de droit d'accès des individus aux renseignements personnels qui les concernent.

39 The Supreme Court of Canada has elaborated upon the objectives of the *Privacy Act*. In *Lavigne v. Canada*, 2002 SCC 53, [2002] 2 S.C.R. 773 at paragraph 24, Justice Gonthier stated,

> [24] The *Privacy Act* is also fundamental in the Canadian legal system. It has two major objectives. Its aims are, first, to protect personal information held by Government Institutions, and second, to provide individuals with a right of access to personal information about themselves...

Several paragraphs later, Justice Gonthier further stated:

> [27] To achieve the objectives of the *Privacy Act*, Parliament has created a detailed scheme for collecting, using and disclosing personal information. First, the Act specifies the circumstances in which personal information may be collected by a government institution, and what use the institution may make of it: only personal information that relates directly to an operating program or activity of the government institution that collects it may be collected (s.4), and it may be used for the purpose for which it was obtained or compiled by the institution or for a use consistent with that purpose, and for a purpose for which the information may be disclosed to the institution under s. 8(2) (s.7). As a rule, personal information may never be disclosed to third parties except with the

consent of the individual to whom it relates (s.8(1)) and subject to the exceptions set out in the Act (s.8(2)).

40 These passages from *Lavigne* indicate the importance of the protection of privacy in relation to Personal Information collected and held by our government and its emanations. However, they also point to a number of specific instances in which such Personal Information can be used and disclosed.

41 The *Privacy Act* applies to Government Institutions. Section 4 of the *Privacy Act* prohibits the collection of Personal Information about individuals unless it relates directly to an operating program or activity of the institution.

42 Once Personal Information has been collected and becomes subject to the control of a Government Institution, paragraph 7(*a*) of the *Privacy Act* limits its use to the purpose for which it was obtained or compiled, or to a use consistent with that purpose. Paragraph 7(*b*) of the *Privacy Act* permits such information to be used for a purpose for which it may be disclosed under subsection 8(2) of the *Privacy Act*.

43 Section 7 of the *Privacy Act* reads as follows:

> **7.** Personal information under the control of a government institution shall not, without the consent of the individual to whom it relates, be used by the institution except:
>
> (*a*) for the purpose for which the information was obtained or compiled by the institution or for a use consistent with that purpose; or
>
> (*b*) for a purpose for which the information may be disclosed to the institution under subsection 8(2).
>
> * * *
>
> **7.** À défaut du consentement de l'individu concerné, les renseignements personnels relevant d'une institution fédérale ne peuvent servir à celle-ci:
>
> *a*) qu'aux fins auxquelles ils ont été recueillis ou préparés par l'institution de même que pour les usages qui sont compatibles avec ces fins;
>
> *b*) qu'aux fins auxquelles ils peuvent lui être communiqués en vertu du paragraphe 8(2).

44 Subsection 8(1) of the *Privacy Act* prohibits disclosure of Personal Information under the control of a Government Institution without the consent of the individual, subject to certain exceptions contained in subsection 8(2) of the *Privacy Act*. Subsection 8(1) reads as follows:

> 8. (1) Personal information under the control of a government institution shall not, without the consent of the individual to whom it relates, be disclosed by the institution except in accordance with this section.
>
> * * *
>
> 8. (1) Les renseignements personnels qui relèvent d'une institution fédérale ne peuvent être communiqués, à défaut du consentement de l'individu qu'ils concernent, que conformément au présent article.

45 Of particular relevance to this appeal are the exceptions to paragraph 8(1) of the *Privacy Act* contained in paragraphs 8(2)(*a*) and (*b*) and sub-paragraph (*m*)(i) of the *Privacy Act*, which read as follows:

> 8. (2) Subject to any other Act of Parliament, personal information under the control of a government institution may be disclosed
>
> (*a*) for the purpose for which the information was obtained or compiled by the institution or for a use consistent with that purpose;
>
> (*b*) for any purpose in accordance with any Act of Parliament or any regulation made thereunder that authorizes its disclosure;
>
> ...
>
> (*m*) for any purpose where, in the opinion of the head of the institution,
>
> (i) the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure,
>
> * * *
>
> 8. (2) Sous réserve d'autres lois fédérales, la communication des renseignements personnels qui relèvent d'une institution fédérale est autorisée dans les cas suivants :

> *a*) communication aux fins auxquelles ils ont été recueillis ou préparés par l'institution ou pour les usages qui sont compatibles avec ces fins;
>
> *b*) communication aux fins qui sont conformes avec les lois fédérales ou ceux de leurs règlements qui autorisent cette communication;
>
> ...
>
> *m*) communication à toute autre fin dans les cas où, de l'avis du responsable de l'institution :
>
> (i) des raisons d'intérêt public justifieraient nettement une éventuelle violation de la vie privée,

46 A further exemption with respect to the use and disclosure of Personal Information is found in subsection 69(2) of the *Privacy Act*, which reads as follows:

> 69. (2) Sections 7 and 8 do not apply to personal information that is publicly available.
>
> * * *
>
> 69. (2) Les articles 7 et 8 ne s'appliquent pas aux renseignements personnels auxquels le public a accès.

The *Privacy Act* contains no definition of Publicly Available.

The Agency

47 There is no doubt that the Agency falls within the definition of Government Institution. As such, the Agency is bound by the provisions of that legislation. However, this case raises interesting questions as to how the Agency's adjudicative function -- one part of its broad legislative mandate -- is affected by the scope and application of the *Privacy Act*.

48 A helpful description of the Agency and its functions can be found in *Lukacs v. Canadian Transportation Agency*, 2014 FCA 76, 456 N.R. 186, wherein, at paragraphs 50 to 53, Justice Dawson of this Court stated:

> [50] the Agency has a broad mandate in respect of all transportation matters under the legislative authority of Parliament. The Agency performs two key functions.
>
> [51] First, in its role as a quasi-judicial tribunal, it resolves commercial and consumer transportation-related disputes. Its mandate was increased to include resolving accessibility issues for persons with disabilities.
>
> [52] Second, the Agency functions as an economic regulator, making determinations and issuing licenses and permits to carriers which function within the ambit of Parliament's authority. In both roles the Agency may be called to deal with matters of significant complexity.

49 This description highlights the duality of the Agency's functions. It acts in an administrative capacity, when carrying out its economic regulatory mandate, and in a quasi-judicial, or court-like capacity, when carrying out its adjudicative dispute resolution mandate. In this latter capacity, the Agency exercises many of the powers, rights and privileges of superior courts (see sections 25 to 35 of the CTA).

The Agency's Rules

50 Section 17 of the CTA empowers the Agency to make rules governing the manner of and procedures for dealing with matters and business that come before it. At the time that Dr. Lukacs brought this application, the Old Rules were in force. They have been superseded by the *Canadian Transportation Agency Rules (Dispute Proceedings at Certain Rules Applicable to All Proceedings*), SOR/2014-104 (the "New Rules").

51 While both sets of Rules relate to proceedings before the Agency, the New Rules are more comprehensive and, in general, apply only to the Agency's dispute resolution proceedings. In an annotated version of the New Rules (the "Annotation") (See: Canadian Transportation Agency, *Annotated Dispute Adjudication Rules* (21 August 2014), online: Canadian Transportation Agency <https://www.otc-cta.gc.ca/eng/publication/annotated-dispute-adjudication-rul es>), the Agency provides the following description of its adjudicative and non-adjudicative functions:

> The Agency performs two key functions within the federal transportation system:
>
> * Informally and through formal adjudication (where the Agency reviews an application and makes a decision), the Agency resolves a range of commercial and consumer transportation-related disputes, including accessibility issues for persons with disabilities. It operates

like a court when adjudicating disputes.

* As an economic regulator, the Agency makes decisions and issues authorities, licences and permits to transportation service providers under federal jurisdiction.

[Emphasis added]

52 Both the Old Rules and the New Rules contemplate the commencement of dispute resolution proceedings by the filing of complaint documentation. The New Rules specifically provide that the proceedings do not commence until the application documentation has been accepted by the Agency.

53 Both sets of Rules require that documents filed with the Agency in respect of dispute resolution proceedings must be placed by it on its Public Record. Subsection 23(1) of the Old Rules reads as follows:

Claim for confidentiality

23. (1) The Agency shall place on its public record any document filed with it in respect of any proceeding unless the person filing the document makes a claim for its confidentiality in accordance with this section.

* * *

Demande de traitement confidentiel

23. (1) L'Office verse dans ses archives publiques les documents concernant une instance qui sont déposés auprès de lui, à moins que la personne qui les dépose ne présente une demande de traitement confidentiel conformément au présent article.

Subsection 7 of the New Rules reads as follows:

Filing

7. (1) Any document filed under these Rules must be filed with the Secretary of the Agency.

Agency's public record

(2) All filed documents are placed on the Agency's public record unless the person filing the document files, at the same time, a request for confidentiality under section 31 in respect of the document.

* * *

Dépôt

7. (1) Le dépôt de documents au titre des présentes règles se fait auprès du secrétaire de l'Office.

Archives publiques de l'Office

(2) Les documents déposés sont versés aux archives publiques de l'Office, sauf si la personne qui dépose le document dépose au même moment une requête de confidentialité, en vertu de l'article 31, à l'égard du document.

Both sets of Rules -- subsections 23(3) to (9) of the Old Rules and section 31 of the New Rules -- empower the Agency to grant confidentiality protection in respect of documents that are filed by parties to the proceedings.

54 The Agency's perspective with respect to the privacy implications of filings made under subsection 7(2) of the New Rules is set forth in the Annotation as follows:

The Agency's record

The Agency's record is made up of all the documents and information gathered during the dispute proceeding that have been accepted by the Agency. This record will be considered by the Agency when making its decision.

The Agency's record can consist of two parts: the public record and the confidential record.

Public Record

Generally, all documents filed with and accepted by the Agency during the dispute proceeding, including the names of parties and witnesses, form part of the public record.

Parties filing documents with the Agency should not assume that a document that they believe is confidential will be kept confidential by the Agency. A request to have a document kept confidential may be made pursuant to section 31 of the Dispute Adjudication Rules.

Documents on the public record will be:

* Provided to the other parties involved;

* Considered by the Agency in making its decision; and

* Made available to members of the public, upon request, with limited exceptions.

Decisions and applications are posted on the Agency's website and include the names of the parties involved, as well as witnesses. Medical conditions which relate to an issue raised in the application will also be disclosed. The decision will also be distributed by e-mail to anyone who has subscribed through the Agency's website to receive Agency decisions.

Confidential record

The confidential record contains all the documents from the dispute proceeding that the Agency has determined to be confidential.

If there are no confidential documents, then there is only a public record.

No person can refuse to file a document with the Agency or provide it to a party because they believe that it is confidential. If a person is of the view that a

> document is confidential, they must file it with the Agency along with a request for confidentiality under section 31 of the Dispute Adjudication Rules. This will trigger a process where the Agency will determine whether the document is confidential. During this process, the document is not placed on the public record.
>
> Decisions that contain confidential information that is essential to understanding the Agency's reasons will be treated as confidential as well and will not be placed on the Agency's website. However, a public version of the decision will be issued and placed on the website.
>
> [Emphasis added]

55 There is no definition of Public Record in either the Old Rules or the New Rules.

The Factual Context in this Application

56 It is undisputed that the documents that were requested by Dr. Lukacs were placed by the Agency on its Public Record in the Cancun Matter and that the Agency made no confidentiality order in respect of any of those documents

57 It is equally clear that certain portions of the documents that were provided by the Agency to Dr. Lukacs were redacted. Moreover, those redactions were made by an employee of the Agency, not by a member of the Agency carrying out a quasi-judicial function.

B. The Refusal Issue

The Standard of Review

58 The issue is whether the Agency, acting through its Chairperson, erred in concluding that subsection 8(1) of the *Privacy Act* required it to redact Personal Information contained in the documents on its Public Record in the Cancun Matter, before disclosing those documents to Dr. Lukacs in response to his request.

59 In accordance with this Court's decision in *Nault v. Canada (Public Works and Government Services)*, 2011 FCA 263, 425 N.R. 160 at paragraph 19, citing *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)*, 2003 SCC 8, [2003] 1 S.C.R. 66 at paragraphs 14 to 19, the standard of review applicable to the decision of the head of a Government Institution to refuse to disclose documents containing Personal Information is correctness. *Nault* also stipulates that the interpretation of provisions of the *Privacy Act* that are

relevant to the refusal to disclose is also to be reviewed on the standard of correctness.

The Positions of the Parties

60 The determination of the correctness of the Refusal requires the interpretation of a number of provisions of the *Privacy Act*.

61 By virtue of subsection 69(2) of the *Privacy Act*, it is clear that the prohibition on disclosure of Personal Information in subsection 8(1) of the *Privacy Act* is inapplicable in respect of Personal Information that is Publicly Available.

62 Thus, if the documents placed by the Agency on its Public Record in the Cancun Matter are Publicly Available, then the redactions made to them on behalf of the Agency were impermissible and, without more, the application for judicial review must be allowed.

Dr. Lukacs' Submission -- "Publicly Available"

63 Dr. Lukacs argues that he is entitled to receive the Unredacted Documents because they were placed on the Agency's Public Record and, accordingly, any Personal Information that might be contained in them is Publicly Available. As such, he asserts that the prohibition in subsection 8(1) of the *Privacy Act* is inapplicable.

The Agency's Position -- "Publicly Available"

64 Counsel for the Agency asserts that Personal Information of each party to an adjudicative proceeding before the Agency is put into a personal information bank (a "Personal Information Bank"), as contemplated by section 10 of the *Privacy Act*, and therefore is not information that is Publicly Available. Further, counsel for the Agency asserts that this Court should reject the argument that, in absence of a confidentiality order, the Agency is required to disclose documents on its Public Record in an unredacted form. Finally, counsel for the Agency asserted that, if Parliament had intended that the right to disclosure of documents pursuant to the open court principle was to override subsection 8(1) of the *Privacy Act*, that legislation would have contained a specific provision to that effect.

The Attorney General of Canada's Position
-- "Publicly Available"

65 The Attorney General of Canada took no position with respect to the interpretation and application of subsection 69(2) of the *Privacy Act* in this appeal.

The Privacy Commissioner's Position
-- "Publicly Available"

66 Counsel for the Privacy Commissioner asserts that Personal Information cannot be Publicly

Available unless it is obtainable from another source or available in the public domain for ongoing use by the public when Dr. Lukacs made his request. In addition, the Privacy Commissioner asserts that information on the Agency's Public Record cannot be Publicly Available simply because the Agency is subject to the open court principle.

Discussion

67 To decide this issue, it is necessary to interpret the terms Publicly Available and Public Record. Unfortunately, the parties were unable to provide the Court with any determinative authorities in this regard.

The interpretative approach

68 In *Canada Trustco Mortgage Co. v. Canada*, [2005] 2 S.C.R. 601, 2005 SCC 54, the Supreme Court provided the following interpretative guidance at paragraph 10:

> 10 It has been long established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.
>
> [Emphasis added]

"Publicly Available"

69 The term Publicly Available appears to me to be relatively precise and unequivocal. I interpret these words as meaning available to or accessible by the citizenry at large. This interpretation is also consistent with the apparent context and purpose of subsection 69(2) of the *Privacy Act*. That provision is located in a portion of the *Privacy Act*, entitled "Exclusions", that sets out circumstances in which the *Privacy Act*, or sections thereof, do not apply. The purpose of subsection 69(2) of the *Privacy Act* is to render the use and disclosure limitations that are contained in sections 7 and 8 of the *Privacy Act* inapplicable to Personal Information if and to the extent that

the citizenry at large otherwise has the ability to access such information.

"Public Record"

70 In my view, the meaning of Public Record is not precise and unequivocal. Instead, the context in which this term appears is critical to the discernment of its meaning. The term appears in subsection 23(1) of the Old Rules.

71 In the judicial context, the record consists of a documentary memorialization of the proceedings that have come before the court. The documents on the record constitute the foundation upon which the court grounds its ultimate decision. The purpose of the record is to facilitate scrutiny of the court's decision, whether for the specific purpose of appellate review or the more general purpose of judicial transparency. Thus, when a court places documents on its record, it adheres to the open court principle.

72 However, as has been noted earlier in these reasons, there are circumstances in which unfettered access to the record before the court runs counter to competing societal interests. In those circumstances, the affected party may apply to the court for relief, either under the procedural rules of that court or on the basis of the *Dagenais/Mentuck* test in respect of *Charter*-based applications. In appropriate circumstances, the court will circumscribe the scope and application of the open court principle. When it does so, the court will have determined that, in the circumstances, safeguarding the integrity of the administration of justice and protecting the often vulnerable party who seeks that protection, outweigh the benefits of open access that the open court principle would otherwise provide. Thus, the open court principle mandates that the record of the court will be available for public access and scrutiny, except to the extent that the Court otherwise determines.

73 In my view, there is no principled reason to employ a more limited interpretation of the term record simply because that term relates to a quasi-judicial adjudicative tribunal, such as the Agency, rather than a court. The record of the proceedings before the Agency performs essentially the same function as the record of a court.

74 In interpreting the term record, in subsection 23(1) of the Old Rules, I adopt the meaning referred to above, namely a documentary memorialization of the proceedings that have come before the Agency. The additional word "public" provides a useful contrast to the situation in which materials on the record have been determined by the Agency to be confidential. In other words, as noted in the excerpt from the Annotation referred to in paragraph 54 of these reasons, the Agency's Public Record can be viewed as a record that contains no confidential documents.

75 The Annotation provides an illustration of the Agency's perspective with respect to requests for confidentiality

> The Agency is a quasi-judicial tribunal that follows the "open court principle." <u>This principle guarantees the public's right to know how justice is administered</u>

> and to have access to decisions rendered by courts and tribunals, except in exceptional cases. That is, the other parties in a dispute proceeding have a fundamental right to know the case being made against them and the documents that the decision-maker will review when making its decision which must be balanced against any specific direct harm the person filing the documents alleges will occur if it is disclosed. This means that, upon request, and with limited exceptions, all information filed in a dispute proceeding can be viewed by the public.
>
> In general, all documents filed with or gathered by the Agency in a dispute proceeding, including the names of the parties and witnesses, form part of the public record. Parties filing documents with the Agency must also provide the documents to the other parties involved in the dispute proceeding under section 8 of the Dispute Adjudication Rules.
>
> [Emphasis added]

Is the Agency's public record publicly available?

76 The Privacy Commissioner asserts that to be Publicly Available, the documents requested by Dr. Lukacs must have been freely obtainable from a source other than the Agency. However, the Privacy Commissioner offers no jurisprudential authority for this proposition, and I reject it.

77 This assertion ignores the bifurcated nature of the Agency's mandate. As noted above, the Agency functions as an economic regulator and as a quasi-judicial dispute resolution tribunal.

78 The documents initiating a dispute may well be required to be kept in Personal Information Banks, immediately after their receipt by the Agency. However, compliance by the Agency with its obligation in subsection 23(1) of the Old Rules means that those documents have left the cloistered confines of such banks and moved out into the sunlit Public Record of the Agency. In my view, the act of placing documents on the Public Record is an act of disclosure on the part of the Agency. Thus, documents placed on the Agency's Public Record are no longer "held" or "under the control" of the Agency acting as a Government Institution. From the time of their placement on the Public Record, such documents are held by the Agency acting as a quasi-judicial, or court-like body, and from that time they become subject to the full application of open court principle. It follows, in my view, that, once on the Public Record, such documents necessarily become Publicly Available.

79 In this regard, two comments are apposite. First, in placing documents on its Public Record, the Agency is acting properly and within the law. Such disclosure by the Agency is necessary for it to fulfill its dispute resolution mandate, and in particular to comply with the requirements of

subsection 23(1) of the Old Rules or subsection 7(2) of the New Rules. Secondly, either subsections 23(3) to (9) of the Old Rules or section 31 of the New Rules will permit the parties to the proceedings to request a confidentiality order from the Agency. These confidentiality provisions enable the Agency to protect the privacy interests of participants in dispute resolution proceedings before it. They do so in substantially the same way that such interests are protected in judicial proceedings, while preserving the presumptively open access to the Agency's proceeding in accordance with the open court principle. To underscore this point, it was open to the parties in the Cancun Matter to request a confidentiality order in relation to any Personal Information filed in that matter, but no such request was made.

80 In conclusion, it is my view that once the Agency placed the documents in the Cancun Matter on its Public Record, as required by subsection 23(1) of the Old Rules, those documents became Publicly Available. As such, the limitation on their disclosure, contained in subsection 8(1) of the *Privacy Act*, was no longer applicable by virtue of subsection 69(2) of the *Privacy Act*. Accordingly, Dr. Lukacs was entitled to receive the documents that he requested and the Agency's refusal to provide them to him was impermissible.

C. The Constitutional Issue

81 The resolution of the Refusal Issue makes it unnecessary for me to consider the Constitutional Issue.

V. DISPOSITION

82 For the foregoing reasons, I would allow the application for judicial review and direct the Agency to provide the Unredacted Documents to Dr. Lukacs. In view of the complexities of the issues that were raised in this application and the considerable time that was spent by Dr. Lukacs I would award Dr. Lukacs a moderate allowance in the amount of $750.00 plus reasonable disbursements, such amounts to be payable by the Agency.

RYER J.A.
NEAR J.A.:-- I agree.
BOIVIN J.A.:-- I agree.

Indexed as:

R. v. Schwartz

Arnold Godfried Schwartz, appellant;
v.
Her Majesty The Queen, respondent,
and
The Attorney General of Canada, intervener.

[1988] 2 S.C.R. 443

[1988] S.C.J. No. 84

File No.: 18401.

Supreme Court of Canada

1987: October 14 / 1988: December 8.

Present: Dickson C.J. and Beetz, Estey *, McIntyre, Lamer, La Forest and L'Heureux-Dubé JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

* Estey J. took no part in the judgment.

Constitutional law -- Charter of Rights -- Presumption of innocence -- Gun control -- Reverse onus with respect to proof of registration certificate for restricted weapon -- Whether reverse onus infringing presumption of innocence -- Canadian Charter of Rights and Freedoms, ss. 1, 11(d) -- Criminal Code, R.S.C. 1970, c. C-34, ss. 89(1)(a), (b), 106.7(1), (2).

Criminal law -- Gun control -- Registration certificate for restricted weapon -- Owner of weapon required to prove possession of certificate -- Whether reverse onus infringing presumption of innocence guaranteed by Charter -- Canadian Charter of Rights and Freedoms, ss. 1, 11(d) -- Criminal Code, R.S.C. 1970, c. C-34, ss. 89(1)(a), (b), 106.7(1), (2).

Courts -- Jurisdiction -- Appeal from summary conviction appeal court -- Jurisdiction of Court of Appeal.

Appellant was convicted in Provincial Court on two counts of unlawful possession of a restricted weapon. The original owner had purchased the weapons in the United States, had registered them in Canada when he moved to Winnipeg, and had given the registration papers, which were in his name, to appellant when appellant bought the weapons. Appellant's application for a firearms acquisition certificate was refused by the Winnipeg Police. The police later searched appellant's home and confiscated the restricted weapons. The convictions [page444] were quashed by the summary conviction appeal court but were restored by the Court of Appeal. The constitutional question before the Court dealt with whether s. 106.7(1) of the Criminal Code contravened s. 11(d) of the Canadian Charter of Rights and Freedoms. Also at issue was whether the Court of Appeal erred in deciding the appeal on a question of fact or, in the alternative, on a question of mixed fact and law.

Held (Dickson C.J. and Lamer J. dissenting): The appeal should be dismissed. The constitutional question should be answered in the negative.

Per McIntyre, La Forest and L'Heureux-Dubé JJ.: A question of law involving the admissibility of evidence was raised here. To set aside an acquittal, the Crown must satisfy the Court that the result would not necessarily have been the same if the error made at trial had not occurred. The Crown met that test.

Parliament in enacting Part II.1 of the Criminal Code intended to prohibit the acquisition and use of weapons except as permitted by the strict controls it prescribed. Only a person possessing a restricted weapon for which he has no registration certificate can be convicted under s. 89(1). If a certificate of registration is not obtained, a criminal offence arises from the mere possession of the restricted firearm. Far from reversing any onus, s. 106.7 provides that a document purporting to be a valid registration certificate is evidence and proof of the statements contained therein and exempts an accused from prosecution.

Although the accused must establish that he falls within the exemption, there is no danger that he could be convicted under s. 89(1), despite the existence of a reasonable doubt as to guilt, because the production of the certificate resolves all doubts in favour of the accused and in the absence of the certificate no defence is possible once possession has been shown.

It was not necessary to consider s. 1 here. The impugned legislation, however, did meet the Oakes test. Firstly, its objective was sufficiently important to warrant overriding a constitutionally protected right. Secondly, the proportionality test was met. The provisions were rational, fair and not arbitrary; they impaired [page445] the protected right as little as possible; and, the measures adopted were carefully tailored to balance the community interest and the interest of those wanting to legally possess weapons.

Per Beetz J.: Given the dates of pre-Charter trial and post-Charter summary conviction appeal, it was assumed without deciding that the Charter applied; the reasons of McIntyre J. were concurred in.

Per Dickson C.J. (dissenting): Any burden on the accused that permits a conviction despite the presence of a reasonable doubt violates the presumption of innocence, regardless of the nature of the point the accused was required to prove. Otherwise, an accused, forced but unable to persuade the finder of fact of his or her innocence on a balance of probabilities, would be convicted of a criminal offence despite the existence of a reasonable doubt as to his or her guilt. The differences between defences which deny the existence of an essential element of an offence and defences that admit the existence of those elements do not affect the review of a provision under s. 11(d). When the facts give rise to the possibility of either type of defence, the Crown should be required to disprove them by proof of guilt beyond a reasonable doubt.

Lack of registration, whether or not it is an "essential element" of s. 89(1) of the Code, is essential to the verdict. Section 106.7(1) relieves the Crown of the onus of proof beyond a reasonable doubt and requires the person charged under s. 89(1) to "prove" possession of a registration certificate on a balance of probabilities. The accused, therefore, is required to raise a more than a reasonable doubt. An accused, unable to meet this persuasive burden, could be convicted of unlawful possession of a restricted weapon notwithstanding the potential existence of a reasonable doubt.

The presumption of innocence guaranteed by s. 11(d) of the Charter is not subject to statutory or common law exceptions and is infringed by any provision requiring that the accused bear a persuasive burden. In some instances, however, the accused may be required to point out some evidential basis to raise a defence which the Crown must then disprove beyond a reasonable doubt. Factors such as ease of proof and a rational connection [page446] go to the justification for an infringement and should be considered in the s. 1 analysis.

The Code contains a comprehensive 'gun control' legislative scheme intended to discourage the use of firearms. The objective behind Part II.1 in general and s. 106.7(1) in particular relates to concerns which are pressing and substantial in a free and democratic society. The proportionality test in Oakes, however, was not met. There was no rational connection between the provision and the objective. The proved fact (possession of a restricted weapon) did not prove the presumed fact (lack of a registration certificate). The presumption of innocence was not impaired "as little as possible" by the challenged provision. To authenticate the certificate, the accused must testify (and so choose between his constitutionally guaranteed rights not to testify or to be presumed innocent) or call the local registrar of firearms as a defence witness. The Crown can disprove the existence of a registration certificate with information from the local registrar of firearms as to whether or not a certificate has been issued and, as a backup, from the central registry of all registration certificates.

Section 106.7(1) is not completely invalid notwithstanding the invalidity of its application here. While the nature of the registration figured highly in the s. 1 analysis here, the justification for s. 106.7(1) in connection with other documents or permits in Part II.1 could likely involve different issues and a different s. 1 analysis.

Per Lamer J. (dissenting): The disposition and the reasons of the Chief Justice, except for the

objective assigned to s. 106.7 under the s. 1 scrutiny, were concurred in.

Section 106.7(1) is neither particular nor essential to weapons legislation. It is a purely evidentiary section intended to relieve the prosecution of the inconvenience of securing a certificate from the appropriate authority attesting to the absence of any record establishing registration. The objective, when the cost of this convenience is expressed in terms of a restriction on an accused's rights, was not sufficiently important to warrant overriding an accused's rights under s. 11(d). [page447]

Cases Cited

By McIntyre J.

Applied: R. v. Oakes, [1986] 1 S.C.R. 103; distinguished: R. v. Appleby, [1972] S.C.R. 303; R. v. Vaillancourt, [1987] 2 S.C.R. 636; R. v. Whyte, [1988] 2 S.C.R. 3; referred to: R. v. Conrad (1983), 8 C.C.C. (3d) 482; R. v. Shelley, [1981] 2 S.C.R. 196; R. v. Edwards Books and Art Ltd., [1986] 2 S.C.R. 713; R. v. Morgentaler, [1988] 1 S.C.R. 30; R. v. Lee's Poultry Ltd. (1985), 17 C.C.C. (3d) 539; Dubois v. The Queen, [1985] 2 S.C.R. 350; R. v. Mannion, [1986] 2 S.C.R. 272.

By Dickson C.J. (dissenting)

R. v. Oakes, [1986] 1 S.C.R. 103, aff'g (1983), 145 D.L.R. (3d) 123; R. v. Appleby, [1972] S.C.R. 303; Sunbeam Corporation (Canada) Ltd. v. The Queen, [1969] S.C.R. 221; Rose v. The Queen, [1959] S.C.R. 441; R. v. Ponsford (1978), 41 C.C.C. (2d) 433; R. v. Colbeck (1978), 42 C.C.C. (2d) 117; Vezeau v. The Queen, [1977] 2 S.C.R. 277; R. v. Vaillancourt, [1987] 2 S.C.R. 636; R. v. Holmes, [1988] 1 S.C.R. 914; R. v. Whyte [1988] 2 S.C.R. 3; R. v. Edwards, [1974] 2 All E.R. 1085; R. v. Lee's Poultry Ltd. (1985), 17 C.C.C. (3d) 539; Latour v. The King, [1951] S.C.R. 19; R. v. Proudlock, [1979] 1 S.C.R. 525; R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295; McGuigan v. The Queen, [1982] 1 S.C.R. 284; R. v. Wilson (1984), 17 C.C.C. (3d) 126; Dubois v. The Queen, [1985] 2 S.C.R. 350.

By Lamer J. (dissenting)

R. v. Oakes, [1986] 1 S.C.R. 103.

Statutes and Regulations Cited

Canada Evidence Act, R.S.C. 1970, c. E-10, ss. 29(2), 30.
Canadian Charter of Rights and Freedoms, ss. 1, 11(c), (d).
Criminal Code, R.S.C. 1970, c. C-34, ss. 83(1), 84, 88(1), 89(1), (2), (3), 90, 91(1), 94(1), 95(3), 104(1), (12), 106.1(1), (3), (6), (7), (8), 106.2(1), (10), 106.4(3), 106.6(1), 106.7(1), (2), 241(1), (6), (7), 605(1)(a), 613(1)(a), 730, 755(1), 771(1), (2).
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APPEAL from a judgment of the Manitoba Court of Appeal (1983), 25 Man. R. (2d) 295 (on a rehearing following a preliminary judgment of that Court (1983), 25 Man. R. (2d) 164, 5 D.L.R. (4th) 524) allowing an appeal from a decision of Barkman Co. Ct. J. (1983), 22 Man. R. (2d) 46, allowing an appeal from conviction by Allen Prov. Ct. J. Appeal dismissed, Dickson C.J. and Lamer J. dissenting. The constitutional question should be answered in the negative.

J.J. Gindin, for the appellant.
Bruce Miller, for the respondent.
Julius A. Isaac and Yvon Vanasse, for the intervener the Attorney General of Canada.

Solicitors for the appellant: Gindin, Soronow, Malamud & Gutkin, Winnipeg.
Solicitor for the respondent: The Attorney General of Manitoba, Winnipeg.
Solicitor for the intervener the Attorney General of Canada: Frank Iacobucci, Ottawa.

The following are the reasons delivered by

1 DICKSON C.J. (dissenting):-- Section 106.7(1) of the Criminal Code, R.S.C. 1970, c. [page449] C-34, requires an accused charged with a firearms offence to prove that he or she held the necessary permit or certificate for the firearm. The constitutional validity of this section is the primary question in this case. A secondary question is raised as to the jurisdiction of a provincial court of appeal on an appeal from a summary conviction appeal court. At the outset, I would like to mention that this case has been argued throughout on the basis of s. 106.7(1). Section 730 of the Code has not been in issue.

I

Facts

2 Arnold Godfried Schwartz was charged under s. 89(1) of the Criminal Code (i) that he did unlawfully have in his possession a restricted weapon, to wit: a .44 Magnum revolver for which he did not have a registration certificate issued to him; (ii) that he did unlawfully have in his possession a restricted weapon, to wit: a .38 Special revolver for which he did not have a registration certificate issued to him. The evidence disclosed that Schwartz had bought the two handguns in 1978 from one of his employees, Horst Schimiczek, who had acquired the .38 Special in Texas and the .44 Magnum in North Dakota. Schimiczek had moved to Winnipeg, duly registered the two weapons, and then sold the guns to Schwartz. He gave Schwartz the registration papers, in Schimiczek's name. Later, an application in Schwartz's name for a firearms acquisition certificate, the necessary first step to obtain a registration certificate, was received by the Firearms Section of the City of Winnipeg Police Department. At the time, the Firearms Section was under control of Staff Sergeant Gordon Pilcher, who reviewed the application and determined that a notice of intention to refuse a firearms acquisition certificate should be sent to Schwartz. A notice to this effect was delivered to Schwartz by double registered mail.

3 Approximately nine months after the notice was mailed, members of the Winnipeg Police Department executed a search of Schwartz's home, and [page450] located and confiscated a .44 Magnum and a .38 Special.

4 Schwartz proceeded to trial before Allen Prov. Ct. J. and was convicted on both charges. He was fined $50 on each charge. On appeal, Barkman Co. Ct. J. allowed the appeal and quashed the convictions. The Crown then appealed to the Manitoba Court of Appeal (Hall J.A., Matas J.A. concurring, and Huband J.A. dissenting in part). The acquittals were set aside and convictions restored. Leave was granted by this Court to appeal the judgment of the Manitoba Court of Appeal.

II

Legislative and Constitutional Provisions

5 The relevant legislative and constitutional provisions follow:

Criminal Code

> 89. (1) Every one who has in his possession a restricted weapon for which he does not have a registration certificate
>
> (a) is guilty of an indictable offence and is liable to imprisonment for five years; or
> (b) is guilty of an offence punishable on summary conviction.
>
> 106.7 (1) Where, in any proceedings under any of sections 83 to 106.5, any question arises as to whether a person is or was the holder of a firearms acquisition certificate, registration certificate or permit, the onus is on the accused to prove that that person is or was the holder of such firearms acquisition certificate, registration certificate or permit.
>
> (2) In any proceedings under any of sections 83 to 106.5, a document purporting to be a firearms acquisition certificate, registration certificate or permit is evidence of the statements contained therein.

Canadian Charter of Rights and Freedoms

> 1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can [page451] be demonstrably justified in a free and democratic society.
>
> 11. Any person charged with an offence has the right
>
> . . .
>
> (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

III

Judgments of the Manitoba Courts

Provincial Judges Court

6 Allen Prov. Ct. J. found the appellant guilty on both counts. He stated, in part:

> The fact is there comes a situation in each case where the evidence is so overwhelming and points clearly in one direction that one would have to speculate and resort to pure conjecture to have a reasonable doubt. I do not have a reasonable doubt.

7 Section 106.7(1) of the Code, imposing an onus on the accused, does not appear to have been raised in argument in support of the case for the Crown nor relied upon by Allen Prov. Ct. J. The constitutional validity of the section was not challenged before him.

County Court of Winnipeg

8 There were three major grounds of appeal before Barkman Co. Ct. J. [(1983), 22 Man. R. (2d) 46]. The first was that it was not proved beyond a reasonable doubt that the accused possessed the restricted weapons. The second was that some of the evidence concerning the lack of registration was hearsay and therefore inadmissible. The third ground was that the evidence concerning lack of registration could only be admitted if notice were given under s. 30 of the Canada Evidence Act, R.S.C. 1970, c. E-10.

9 Defence counsel objected to the admission of evidence of Sergeant Pilcher relating to information contained in a file compiled by staff members under his supervision. Counsel also objected to Sgt. Pilcher testifying about any documents that might have been placed in the file after he was [page452] transferred out of the Firearms Section. Barkman Co. Ct. J. held that the trial judge erred by admitting the evidence of Sgt. Pilcher which did not relate specifically to things done by Pilcher himself; Sgt. Pilcher had gone on to other duties; such evidence was hearsay and could only be admitted after giving notice pursuant to s. 30 of the Canada Evidence Act.

10 Barkman Co. Ct. J. considered as properly admitted the evidence of Sgt. Pilcher to the effect that (1) he refused an application by the accused for a firearms acquisition certificate; (2) he wrote a refusal letter; (3) he searched the file of the city of Winnipeg Police regarding the accused in 1979 and did not find a registration certificate for a restricted weapon, and he had the file with him in court; (4) the address of the house of the accused was situated in the city of Winnipeg area for registration of firearms. According to the evidence, no one to whom a certificate had been refused could get a certificate during the five years following. The evidence of Sgt. Pilcher was the only evidence before the judge relating to the registration of the restricted weapons, except for the evidence of the previous owner, Mr. Schimiczek, who testified that he spoke to the accused about registration of the weapons in the early part of 1981 and the accused then told him that he had not yet registered them.

11 Barkman Co. Ct. J. further held [at p. 48] that Sgt. Pilcher could give evidence as to what he did and saw personally, but "his evidence as to what he saw is not evidence of the truth of the information contained in the documents which he saw in the file in question". He held that Allen

Prov. Ct. J. had improperly admitted as an exhibit the application for a firearms acquisition certificate in Schwartz's name as it had not been identified by the person receiving it as having been submitted by Schwartz. He concluded [at p. 49] that the remaining evidence, together with the testimony of Schimiczek, "falls far short of proof beyond a reasonable doubt that the accused did not have [page453] registration certificates issued to him for the restricted weapons ...."

12 Counsel for the Crown, after arguing unsuccessfully against the exclusion of the so-called hearsay evidence, then contended that even if such evidence were not admissible, this would not affect the conviction of the appellant because s. 106.7(1) of the Code placed the onus on the accused to satisfy the Court that the weapons were properly registered. Counsel for Schwartz argued in response that s. 106.7(1) of the Code was either inapplicable to his client or unconstitutional by reason of s. 11(d) of the Charter. Barkman Co. Ct. J. held that s. 106.7(1) was not ambiguous and that it applied to the appellant. He then went on to consider the judgment of the Ontario Court of Appeal in R. v. Oakes (1983), 145 D.L.R. (3d) 123, aff'd [1986] 1 S.C.R. 103. Barkman Co. Ct. J. referred to the three factors mentioned by Martin J.A. in Oakes, underlined in the passage below, at pp. 50-51, to be taken into consideration in determining whether it is reasonable for Parliament to place the burden of proof on the accused in relation to an ingredient of the offences in question:

> (a) the magnitude of the evil sought to be suppressed, it is to my mind a great evil that is sought to be suppressed by the requirement of registration of restricted weapons since registration will not be granted where a person has within the last five years (1) been convicted of an offence on indictment in which violence against another person was used, threatened or attempted; etc (see s. 194(3)(b)); (b) the difficulty of the prosecution making proof of the presumed fact. Since the advent of the computer and in accordance with the evidence of Sergeant Pilcher that records are maintained in Ottawa as to persons who are refused certificates or permits, it would not be difficult for the Crown to prove lack of registration; (c) the relative ease with which the accused may prove or disprove the presumed fact. The accused need only produce the registration certificate or permit to prove the registration (see s. 106.7(2)) in the circumstances of this case, but in other situations it may be more difficult. [Emphasis added.]

[page454]

13 Barkman Co. Ct. J. went on to point out that the circumstances of the case before him were such as to satisfy the threshold question of legitimacy of the reverse onus. However, this provision also applied to ss. 89(3), 91(1), and 94(1). Under these sections it could be very difficult for the accused to prove the fact of registration by another person. He held that (a) there was no rational connection between the proven fact (possession) and the presumed fact (lack of registration), and (b) in applying the reverse onus to all of ss. 83 to 106.5, it may be impossible for an accused to

prove the fact of registration. Section 106.7(1) was therefore constitutionally invalid. He concluded that the trial judge erred by admitting hearsay evidence and that s. 106.7(1) did not apply because it offended s. 11(d) of the Charter. Barkman Co. Ct. J. allowed the appeal and quashed the conviction.

Manitoba Court of Appeal

14 The ground of appeal taken to the Manitoba Court of Appeal was in these terms:

> THAT the learned County Court Judge erred in law in ruling Section 106.7(1) of the Criminal Code of Canada was unconstitutional in that the said section contravened the provisions of Section 11(d) of the Canadian Charter of Rights and Freedoms.

15 It would appear that before the Court of Appeal of Manitoba, counsel agreed to argue only the constitutional question. This was entirely appropriate as appeals to the Court of Appeal from a summary conviction appeal court are limited to questions of law. In a preliminary judgment by the Manitoba Court of Appeal ((1983), 25 Man. R. (2d) 164), Matas J.A. stated, at p. 166:

> ... the decision of Barkman, C.C.C.J., on the constitutional point is inextricably linked to the question of law arising out of the first question [the evidentiary question]. Implicit in the acquittal based on the constitutional question is the decision of the learned Chief County Court judge on the admissibility of evidence given at the trial by Sergeant Pilcher, the officer in charge of the firearms section and applications for firearms acquisitions and permits for restricted weapons in the City of Winnipeg. In my opinion, it is inappropriate for this court to consider constitutional questions in the context [page455] of a prosecution unless all the available material is properly before the court. In order to have a decision of this court, based on all the available material, I would grant leave to the Crown to argue the evidentiary point.

He therefore adjourned the disposition of the appeal pending re-hearing.

16 Upon the re-hearing, the Court of Appeal ((1983), 25 Man. R. (2d) 295), allowed the Crown's appeal (Huband J.A. dissenting in part). Hall J.A. held that Barkman Co. Ct. J. erred in law by ruling inadmissible certain evidence given by Sergeant Pilcher. He further held at p. 297 that "the evidence of Sgt. Pilcher and that of the witness Schimiczek is sufficient to support the implicit finding of the learned trial judge that no registration certificates had ever been issued to the accused for the restricted weapons and that therefore he was not the holder of such certificates...." Though he was of the view that it was unnecessary to decide the issue, Hall J.A. agreed with Huband J.A.'s conclusion, discussed below, that s. 106.7(1) was a reasonable limit on the presumption of innocence. Matas J.A. concurred with Hall J.A. on the evidentiary issue but expressed no opinion on the constitutional point.

17 Huband J.A., dissenting in part, disagreed with Hall J.A.'s conclusion on the evidence and therefore felt it incumbent to rule on the constitutional issue. The appeal to the Court of Appeal, pursuant to s. 771 of the Code, was on a question of law alone. He stated, at p. 299, that "The consideration of Staff Sergeant Pilcher's evidence involves the court in a question of sufficiency of evidence which ... is a question of fact rather than law."

18 Relying on R. v. Appleby, [1972] S.C.R. 303, and refusing to follow the Ontario Court of Appeal's approach in R. v. Oakes, supra, Huband [page456] J.A. held that s. 106.7(1) does not contravene the presumption of innocence according to law. In the alternative, he was of the view that, although it is true that mere possession of a restricted weapon does not logically lead to an inference that the weapon is unregistered, "proof of registration is so easily provided by the accused himself that it becomes reasonable to require an accused to answer an onus upon him at that point". Huband J.A. therefore would have allowed the appeal relying on s. 106.7(1) of the Code.

19 It is difficult to find a common thread in any of the issues in any of the decisions of the Manitoba courts. The court of first instance found the accused guilty on the evidence presented, without recourse to s. 106.7(1) of the Code. On appeal, Barkman Co. Ct. J. held that the evidence of the lack of a registration certificate was inadequate in the absence of s. 106.7(1) and that that section was unconstitutional. He held that the ease of proof concerning possession of a permit was not difficult for the police but utterly impossible for an accused if one looked at all of the offences to which s. 106.7(1) applied. Moving to the Court of Appeal, the picture is less clear. Hall J.A. concluded that the Crown succeeded on the evidential point and although it was therefore unnecessary to consider s. 106.7(1), he would nonetheless have upheld it. Matas J.A. was content to leave the constitutional point to another day and resolved the case simply on the evidentiary point. Finally, Huband J.A., in dissent on this point, would appear to have shared the views of Barkman Co. Ct. J. on the evidentiary point. Although he would have resolved the evidentiary point in favour of the accused, he would uphold s. 106.7(1) and find the accused guilty.

IV

Issues

20 Before this Court, a constitutional question was stated as follows:

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> Is section 106.7(1) of the Criminal Code of Canada constitutionally invalid in that it contravenes the provisions of s. 11(d) of the Canadian Charter of Rights and Freedoms?

The Attorney General of Canada and the Attorneys General of Alberta, British Columbia and Ontario served notices of intervention. All the provincial Attorneys General subsequently withdrew their interventions.

21 In addition to the constitutional question, the appellant submits that the Court of Appeal erred in deciding the appeal on a question of fact or, in the alternative, on a question of mixed fact and law. I propose first to address this latter issue, and then turn to the constitutional issue in this appeal. I note that although the trial in the Provincial Court occurred before the Charter came into force, no issue was raised as to whether section 11(d) should apply, all subsequent proceedings having taken place after April 17, 1982.

V

The Jurisdiction of the Court of Appeal

22 The appellant submits that the Court of Appeal erred in deciding the appeal on a question of fact or mixed fact and law, namely, the sufficiency of evidence. The respondent Crown submits, however, that the Court of Appeal was faced with a question involving the admissibility, not sufficiency, of evidence; the question before the Court of Appeal was a question of law; as a result that court had jurisdiction to hear the case.

23 The notice of appeal to the Court of Appeal filed by the Deputy Attorney General for Manitoba, reproduced above, alleged that Barkman Co. Ct. J. erred in law in holding s. 106.7(1) unconstitutional. In addition, the appeal was "upon any other point in law the evidence may disclose". The Crown appeal was pursuant to s. 771 of the Code, limiting the jurisdiction of the Court of Appeal to questions of law alone. As stated earlier, the Court of Appeal, per Matas J.A., granted leave to argue "the evidentiary point." It is in relation to the Court of Appeal's reasons given after the rehearing that the appellant alleges that the Court of [page458] Appeal decided the case on a question of fact or, in the alternative, mixed law and fact. Section 771(2) of the Code provides that "Sections 601 to 616 apply mutatis mutandis to an appeal under this section." It is well-settled that the question whether a trial verdict is unreasonable or cannot be supported by the evidence is not a "question of law" under s. 605(1)(a) of the Code. Sufficiency of proof is a question of fact reserved for the trial judge. See Sunbeam Corporation (Canada) Ltd. v. The Queen, [1969] S.C.R. 221, and Rose v. The Queen, [1959] S.C.R. 441.

24 It should be noted, however, that a summary conviction appeal court is not restricted to questions of law alone. Section 755(1) of the Code provides that in appeals from a summary conviction, "sections 610 to 616, with the exception of subsections 610(3) and 613(5), apply mutatis mutandis". Section 613(1)(a) permits a summary conviction appeal court to allow an appeal if the verdict is "unreasonable or cannot be supported by the evidence" or if the trial judge erred "on a question of law" (R. v. Ponsford (1978), 41 C.C.C. (2d) 433 (Alta. C.A.)). This is not to say that a summary conviction appeal court is entitled to retry the case (R. v. Colbeck (1978), 42 C.C.C. (2d) 117 (Ont. C.A.))

25 Counsel for the appellant refers to several passages of the reasons of the Court of Appeal in support of his submission that the court decided the appeal on a question of fact. Hall J.A., for example, stated the first of the two issues in the following terms:

> (1) did the learned judge of appeal err in finding that the evidence fell short of providing beyond a reasonable doubt that the accused did not have registration certificates issued to him for the restricted weapons ...?

Moreover, Hall J.A. stated that "the evidence of Sergeant Pilcher and that of the witness [page459] Schimiczek is sufficient to support the implicit finding of the learned trial judge that no registration certificates had ever been issued to the accused for the restricted weapons...." Matas J.A. concurred with this part of Hall J.A.'s reasons, stating that "on the evidentiary issue the appeal of the Crown should be allowed and the conviction restored". The appellant also relies on Huband J.A.'s statement that "The consideration of Staff Sergeant Pilcher's evidence involves the court in a question of sufficiency of evidence which ... is a question of fact rather than law".

26 It cannot be denied, however, that the examination of the sufficiency of evidence by Hall J.A. occurred in the context of his finding that Barkman Co. Ct. J. erred in law "by ruling inadmissible certain unspecified evidence of Sergeant Pilcher relating to information contained in a file compiled by staff members under his supervision on the ground that it did not relate specifically to things done by him and was therefore hearsay and could only be admitted under s. 30 of the Canada Evidence Act". The majority of the Court of Appeal was correct in assuming, and the Crown correct in submitting, that the absence of legal justification for admitting evidence at trial involves a question of law.

27 Assuming the Court of Appeal to be correct on its disposition of this question of law, however, the court in my view erred by proceeding to reverse the acquittal without relying on s. 106.7(1) of the Code. Although the appeal before Barkman Co. Ct. J. was not de novo, the combined effect of s. 771(1) and (2), s. 755(1), and s. 613(1)(a) is that for purposes of review, the findings of Barkman Co. Ct. J. are to be treated as if they were the findings of a judge at first instance. Before it can set aside the decision of the summary conviction appeal court acquitting the accused, the Court of Appeal must be satisfied that Barkman Co. Ct. J. would have convicted Schwartz but for his decision that the trial judge erred in the admission of hearsay evidence: Vezeau v. The Queen, [1977] 2 S.C.R. 277.

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28 Barkman Co. Ct. J. had before him the bulk of Sgt. Pilcher's evidence. His summary of the evidence which he admitted shows that the only major piece of evidence excluded was the application for a firearms acquisition certificate. Taken as a whole, the evidence is ambivalent whether a firearms acquisition certificate, and later on the registration certificate, might have been

issued to the accused some time after 1979, when Sgt. Pilcher was no longer in charge of the file. To set aside the acquittals the jurisprudence of this Court requires that the Crown satisfy the Court that the verdict would not necessarily have been the same had the trial judge not erred with respect to the evidentiary issue. In my view, the Crown did not satisfy that onus and it cannot be said with any degree of certainty that Barkman Co. Ct. J. would have upheld the convictions but for his decision to exclude some of the evidence. Hall J.A. in my opinion therefore erred by entering a conviction without finding it necessary to resort to the "reverse onus" provision of s. 106.7(1). This Court must consider the application, and hence the constitutionality, of s. 106.7(1).

VI

Constitutional Issues: Section 11(d) and the Presumption of Innocence

29 In R. v. Oakes, supra, R. v. Vaillancourt, [1987], 2 S.C.R. 636, R. v. Holmes, [1988] 1 S.C.R. 914, R. v. Whyte, [1988] 2 S.C.R. 3, this Court had occasion to address in detail the scope of the s. 11(d) Charter right "to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal", and there is no need to review at length the principles contained in those cases. It suffices to say that Oakes stands for the proposition that "a provision which requires an accused to disprove on a balance of probabilities the evidence of a presumed fact, which is an important element of the offence in question, violates the presumption of innocence in s. 11(d)" (p. 132). Similarly in Vaillancourt, Lamer J. held, for the majority on this point, that the presumption of innocence [page461] requires that the trier of fact be convinced of guilt beyond a reasonable doubt (at p. 655):

> Any provision creating an offence which allows for the conviction of an accused notwithstanding the existence of a reasonable doubt on any essential element infringes ss. 7 and 11(d).
>
> Clearly, this will occur where the provision requires the accused to disprove on a balance of probabilities an essential element of the offence by requiring that he raise more that just a reasonable doubt.

30 In Holmes, two members of the Court took the view that any burden on the accused that permitted a conviction despite the presence of a reasonable doubt violated the presumption of innocence, regardless of the nature of the point the accused was required to prove. In Whyte, this theme was repeated. In response to the argument that the presumption of innocence only requires the Crown to prove the essential elements of an offence, the Chief Justice said at p. 18:

> The short answer to this argument is that the distinction between elements of the offence and other aspects of the charge is irrelevant to the s. 11(d) inquiry. The real concern is not whether the accused must disprove an element or prove an excuse, but that an accused may be convicted while a reasonable doubt exists.

When the possibility exists, there is a breach of the presumption of innocence.

The exact characterization of a factor as an essential element, a collateral factor, an excuse, or a defence should not affect the analysis of the presumption of innocence. It is the final effect of a provision on the verdict that is decisive. If an accused is required to prove some fact on the balance of probabilities to avoid conviction, the provision violates the presumption of innocence because it permits a conviction in spite of a reasonable doubt in the mind of the trier of facts as to the guilt of the accused. The trial of an accused in a criminal matter cannot be divided neatly into stages, with the onus of proof on the accused at an intermediate stage and the ultimate onus on the Crown.

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(See also Donald Stuart, Canadian Criminal Law (2nd ed. 1987), at pp. 388-91; Richard Mahoney, "The Presumption of Innocence: A New Era" (1988), 67 Can. Bar Rev. 1, at pp. 4-13). To hold otherwise would result in the unacceptable situation that an accused, forced but unable to persuade the finder of fact of his or her innocence on a balance of probabilities, will be convicted of a criminal offence despite the existence of a reasonable doubt as to his or her guilt.

31 The cornerstone of our theory of criminal liability is that society should only sanction those people who are personally guilty of breaking the law. Only when guilt is established can society justly impose criminal penalties. This principle permeates the criminal law and is one of the basic premises of the presumption of innocence. It follows that the Crown is required to prove the guilt of the accused and bears this burden for all the issues raised by a charge. In this respect, a criminal prosecution is fundamentally different from a civil suit, which serves different ends and operates on different assumptions. Theories of proof in civil suits, under both common law and civil law, have been strongly influenced by Roman law, which requires the defendant to raise and prove exceptions to a suit. (See David Finley, "The Presumption of Innocence and Guilt" (1984), 39 C.R. (3d) 115.) Shifting the onus of proof is acceptable in civil actions, as the well-known maxim res ipsa loquitur shows.

32 Over the years, some evidentiary rules of private law have crept into the criminal law, notably reversals of the onus of proof. These influences from civil actions are now subject to review under the Charter, particularly the guarantee of the presumption of innocence. In the final result, if a rule of evidence results in the possibility of a conviction in spite of a reasonable doubt, the presumption of innocence is violated. The exact role that a rule of evidence plays in the prosecution does not matter. The Court in Whyte recognized that there are differences between defences which deny the existence [page463] of an essential element of an offence and defences that admit the existence of

those elements, but held that that difference does not affect the review of a provision under s. 11(d). Both types of defences assert innocence; both deny guilt. When the facts give rise to the possibility of either type of defence, the Crown should be required to disprove them. Laws governing criminal liability should not be analyzed in private law terms as rules and exceptions. All substantive issues raised in a criminal prosecution are related to the fundamental issue of guilt and innocence. They should all be decided by the same standard, proof of guilt beyond a reasonable doubt.

33 Viewed in this light, it matters little whether or not the lack of registration is an "essential element" of s. 89(1) of the Code. It is essential to the verdict. If the lack of registration is an essential element of the offence, then s. 106.7(1) relieves the Crown of the onus of proof of part of the offence charged. If a registration certificate is simply a defence to the charge, then the Crown is not required to disprove that defence beyond a reasonable doubt, which it is normally required to do. However the question of registration is characterized, s. 106.7(1) relieves the Crown of the onus of proof beyond a reasonable doubt. The section places the onus on a person charged under s. 89(1) to "prove" that he or she is or was the holder of a registration certificate. This Court in R. v. Appleby, supra, and again in R. v. Whyte, supra, held that statutory provisions requiring the accused to "prove" or "establish" some fact cannot be read as simply imposing an evidential burden on the accused. When a statute requires the accused to establish or prove something, the accused must do more than raise a reasonable doubt. The accused must establish the required fact on a balance of probabilities. Section 106.7(1) must therefore be understood as requiring an accused charged under s. 89(1) to establish on a balance of probabilities that he or she held a registration certificate for the restricted weapon. Thus, s. 106.7(1) embraces the [page464] possibility that an accused unable to meet this persuasive burden will be convicted of unlawful possession of a restricted weapon contrary to s. 89(1), despite the potential existence of a reasonable doubt that the possession was in fact lawful.

34 The Attorney General of Canada argues that the presumption of innocence entrenched by s. 11(d) of the Charter is subject to exceptions that the common law has always recognized. One of these exceptions, it is argued, is that the common law requires an accused to prove that he or she comes within a statutory exception or proviso, especially when licences or other privileges are involved. The Attorney General argues that s. 106.7(1) is nothing more than a statutory version of this common law rule and is therefore consistent with s. 11(d) of the Charter. The Attorney General of Canada referred the court to R. v. Edwards, [1974] 2 All E.R. 1085 (C.A. Cr. Div.), R. v. Lee's Poultry Ltd. (1985), 43 C.R. (3d) 289 (Ont. C.A.), and Halsbury's Laws of England, vol. 11, 4th, para. 357, in support of this proposition.

35 It is worth noting that Professor Glanville Williams has some critical words for Parliaments and courts alike that are too quick to allow exceptions to the basic principle that the Crown bears the onus of proof:

> When it is said that a defendant to a criminal charge is presumed to be innocent, what is really meant is that the burden of proving his guilt is upon the

> prosecution. This golden thread, as Lord Sankey expressed it, runs through the web of the English criminal law. Unhappily, Parliament regards the principle with indifference - one might almost say with contempt. The Statute Book contains many offences in which the burden of proving his innocence is cast on the accused. In addition, the courts have enunciated principles that have the effect of shifting the burden in particular classes of case.
>
> The sad thing is that there has never been any reason of expediency for these departures from the cherished principle; it has been done through carelessness and lack [page465] of subtlety. What lies at the bottom of the various rules shifting the burden of proof is the idea that it is impossible for the prosecution to give wholly convincing evidence on certain issues from its own hand, and it is therefore for the accused to give evidence on them if he wishes to escape. This idea is perfectly defensible and needs to be expressed in legal rules, but it is not the same as the burden of proof.

(Glanville Williams, The Proof of Guilt (3rd ed. 1963), pp. 184-85). The author goes on to argue that it is consistent with the presumption of innocence to expect the accused to point out evidence that puts in play a particular defence, but it is neither necessary nor desirable that the accused be required to prove anything. If the evidence suggests a defence, the Crown must disprove it beyond a reasonable doubt. The onus of proof remains on the Crown throughout. Other commentators have made the same argument: Rupert Cross, The Golden Thread of the English Criminal Law (1976), at pp. 11-13; Mahoney, "The Presumption of Innocence", supra, at pp. 18-21; Stuart, Canadian Criminal Law, supra, at pp. 39-45.

36 This Court has long recognized that there is a distinction between the degree of evidence necessary to put an issue into play, requiring the trier of fact to consider it, and the degree necessary to convince beyond a reasonable doubt. In Latour v. The King, [1951] S.C.R. 19, Justice Fauteux for the Court distinguished between the requirement of establishing a case and of introducing evidence. He pointed out that the onus is on the Crown throughout to establish the case against the accused beyond a reasonable doubt, while the accused need do no more than raise a doubt. Fauteux J. noted that the accused is never required to establish a defence, but need only show that the evidence, including Crown evidence, indicates a defence may be available. The jury is then required to acquit if it finds affirmatively that the defence existed or if it is left in doubt on the point.

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37 Sunbeam Corporation (Canada) Ltd., supra, provides another illustration of the principle. The Court was faced with the question whether the sufficiency of evidence could be a question of law;

Justice Ritchie for the majority held that it could not. He recognized that the accused was never required to give evidence (at p. 228):

> I do not think that any authority is needed for the proposition that, when the Crown has proved a prima facie case and no evidence is given on behalf of the accused, the jury may convict, but I know of no authority to the effect that the trier of fact is required to convict under such circumstances. [Emphasis in original.]

The Crown is always required to persuade the trier of fact beyond a reasonable doubt, and the accused can rely on the Crown's own evidence to put a defence in play. This principle was reaffirmed by Justice Pigeon for the majority in R. v. Proudlock, [1979] 1 S.C.R. 525, where he held that the phrase "in the absence of any evidence to the contrary" meant that the accused need only raise a reasonable doubt. Pigeon J. commented that in some cases the accused could do this by reference to the Crown's evidence while in other cases the accused would have to adduce evidence or run the risk of conviction.

38 Judges and academics have used a variety of terms to try to capture the distinction between the two types of burdens. The burden of establishing a case has been referred to as the "major burden," the "primary burden," the "legal burden" and the "persuasive burden." The burden of putting an issue in play has been called the "minor burden," the "secondary burden," the "evidential burden," the "burden of going forward," and the "burden of adducing evidence." While any combination of phrases has its advantages and drawbacks, I prefer to use the terms "persuasive burden" to refer to the requirement of proving a case or disproving defences, and "evidential burden" to mean the requirement of putting an issue into play by reference to evidence before the court. The party who [page467] has the persuasive burden is required to persuade the trier of fact, to convince the trier of fact that a certain set of facts existed. Failure to persuade means that the party loses. The party with an evidential burden is not required to convince the trier of fact of anything, only to point out evidence which suggests that certain facts existed. The phrase "onus of proof" should be restricted to the persuasive burden, since an issue can be put into play without being proven. The phrases "burden of going forward" and "burden of adducing evidence" should not be used, as they imply that the party is required to produce his or her own evidence on an issue. As we have seen, in a criminal case the accused can rely on evidence produced by the Crown to argue for a reasonable doubt.

39 It is important not to identify the evidential burden solely with the accused. The Crown has the evidential burden of leading evidence which, if believed, would prove each element of the offence charged. If the Crown does not even meet this evidential requirement, the case never goes to the trier of fact; the accused has a right to a directed verdict of acquittal.

40 In Oakes, supra, the Court examined and rejected the idea that the presumption of innocence guaranteed by s. 11(d) of the Charter is subject to statutory exceptions. To read the phrase

"according to law" in s. 11(d) as permitting Parliament to alter the normal rule whenever it chose to do so by statute would be completely contrary to the concept of an entrenched constitutional right. Oakes, Vaillancourt and Whyte held that statutory persuasive burdens on the accused infringe the presumption of innocence. The common law is likewise required to conform to s. 11(d). A requirement that the accused bear a persuasive burden, whether in a statute or at common law, will infringe s. 11(d).

41 The Edwards case, supra, makes clear that the common law of England does in some cases place a persuasive burden of proof on the accused, but that [page468] case was decided in a system where both Parliament and the courts can make inroads on the presumption of innocence. It is of limited aid in interpreting the Canadian Charter of Rights and Freedoms. This Court has already rejected English authority that the presumption of innocence is subject to statutory exceptions; it is also necessary to reject English authority that the presumption of innocence is subject to common law exceptions.

42 Having said that, I would not wish to be understood to say that the Crown must lead evidence to anticipate each and every possible defence. One of the underlying ideas of the common law principle set out in Edwards is that it is not possible for the Crown to know in advance what defence the accused will raise. It is up to the accused to point out evidence, in either the Crown's case or in the defence evidence, if any, that will support a defence. Once the accused raises a defence the Crown must disprove it beyond a reasonable doubt.

43 The decision of the Ontario Court of Appeal in R. v. Lee's Poultry Ltd., supra, must now be read in the light of this Court's decisions in Oakes, Vaillancourt, and Whyte. In that case, a provincial statute required the accused to prove that it held the necessary permit. Brooke J.A. for the Ontario Court of Appeal followed Edwards and held that in some circumstances a statutory or common law reversal of the onus of proof will not violate s. 11(d). Brooke J.A. also relied on Martin J.A.'s decision in R. v. Oakes. He held that the provision in question did not create a presumption, but simply expressed in statutory form a well-recognized exception to general rules of pleading and proof. He was also influenced by the ease with which an accused could prove a licence existed and by the fact that it was rationally open to the accused to prove the existence of the licence. He therefore held that the provision did not breach s. 11(d).

44 It is necessary, however, to distinguish the analysis under s. 11(d) from that under s. 1. What is important under s. 11(d) is whether or not a [page469] provision requires the accused to prove some fact, with a possibility of a conviction in spite of a reasonable doubt. Factors such as ease of proof and a rational connection go to the justification for an infringement and should be considered in the s. 1 analysis. Lee's Poultry Ltd. is therefore of little assistance on the meaning of s. 11(d).

45 To sum up, the Charter's guarantee of the presumption of innocence places the onus on the Crown throughout a case to prove guilt beyond a reasonable doubt. Section 11(d) is not qualified by exceptions, whether statutory or at common law, that place the onus of proof on the accused. While

the Crown need not initially disprove every possible defence or exception, it does not necessarily follow that the accused must prove a defence. In some instances, the accused must point out some evidential basis to raise a defence which the Crown must then disprove beyond a reasonable doubt, but any provision which places a persuasive burden on the accused, with the possibility of a conviction despite a reasonable doubt, will infringe s. 11(d). Section 106.7(1) is such a provision.

VII

Constitutional Issues: Section 1

46 The respondent and the Attorney General of Canada submit in the alternative that s. 106.7(1) is demonstrably justified under s. 1 as a reasonable limit in a free and democratic society. To decide this point, it is necessary to refer to the principles of s. 1 analysis set out in this Court's decision in Oakes, supra. Two criteria must be met. First, the objective must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom." Second, the limit must be reasonable and demonstrably justified, which requires it to pass "a form of proportionality test" (R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295 at p. 352). This second criterion has three components. The measures must be carefully tailored [page470] and rationally connected to the objective. They must impair the right in question as little as possible. Finally, there must be proportionality between the effects of the measure and the objective of the legislation (Oakes, supra, at p. 139).

47 Part II.1 of the Code, which contains s. 106.7(1), represents the latest attempt by Parliament to strike the proper balance between the interest of Canadian society in protecting its members from violent actions and the freedom of individuals to possess and use guns for legitimate purposes. It embodies wholly legitimate societal concerns for stricter regulation and control of guns and other offensive weapons. The Crown and Attorney General of Canada argue that s. 106.7(1) must be considered in the context of the statutory scheme respecting restricted weapons.

48 The policy of Part II.1 is to limit the ownership of dangerous weapons to those people who will use them in an honest, responsible fashion. Some types of weapons are prohibited altogether. The availability of other types of weapons, notably handguns, is restricted, while long-guns are subject to less strict control. To acquire any type of permitted firearm, a firearms acquisition certificate is required (s. 95(3)). An application for a firearms acquisition certificate will be rejected if the firearms officer has "notice of any matter that may render it desirable in the interest of the safety of the applicant or any other person that the applicant should not acquire a firearm" (s. 104(1)). To possess a restricted weapon, a registration certificate is required in addition to the firearms acquisition certificate. Registration certificates can only be issued to applicants over eighteen who need the restricted weapon to protect life, for use in their occupation, for use in target practice, or for part of a gun collection (s. 106.1(3)). A person who wishes to possess a restricted weapon must apply to the local registrar of firearms for a registration certificate (s. 106.1(1)). The local registrar must examine the weapon and check that the person is [page471] eligible for a

registration certificate. If the person is eligible, the local registrar forwards the application to the Commissioner of the Royal Canadian Mounted Police (s. 106.1(3)). If the local registrar has notice of any matter suggesting that in the interests of safety it would not be advisable for the applicant to have a restricted weapon, the local registrar must inform the Commissioner (s. 106.1(6)). Upon receipt of the application from the local registrar, the Commissioner issues the registration certificate (s. 106.1(7)), unless the Commissioner has notice of any matter suggesting that in the interests of safety it is not desirable that the applicant have a restricted weapon (s. 106.4(3)). The registration certificate only entitles the owner to keep the weapon at his or her residence or place of business (s. 106.1(8)). A carrying permit is required to take the weapon off the premises mentioned in the certificate (ss. 89(2), 106.2(1)).

49 Part II.1 creates a number of offences with respect to the acquisition, possession and use of firearms. Section 83(1) provides that the use of a firearm during the commission of an indictable offence is itself an indictable offence. Section 84 prohibits the careless use of a firearm. Section 88(1) provides that every one who has a prohibited weapon in his or her possession commits an indictable offence. Section 89(1), under which the appellant was charged, prohibits the possession of an unregistered restricted weapon. There are numerous other offences relating to the sale, delivery or acquisition of firearms and other offensive weapons (ss. 91-97).

50 Part II.1 thus expresses a clear legislative intention to prohibit the acquisition, possession and use of all restricted weapons except under the authority of a firearms acquisition certificate and a registration certificate, or under statutory exemptions such as those mentioned in s. 90 with respect to peace officers and police officers. The Code thus contains, as noted in McGuigan v. The Queen, [page472] [1982] 1 S.C.R. 284, "a comprehensive 'gun control' legislative scheme intended to discourage the use of firearms by the criminal element of our society". That the objective behind Part II.1 in general and s. 106.7(1) in particular "relate[s] to concerns which are pressing and substantial in a free and democratic society" is self-evident. The provisions satisfy the first stage of the approach to s. 1 set out in Oakes.

51 It may be wondered whether the specific objective of s. 106.7(1) is simply one of administrative convenience, which is rarely if ever an objective of sufficient importance to warrant overriding a constitutionally protected right. If so, that alone may be enough to decide the s. 1 analysis. Without deciding this point, I prefer to go on to the proportionality analysis, for two reasons. First, the objective of the section must be evaluated in the context of Part II.1, where it is located, and its place in the system of firearm regulation taken into account. Second, for reasons which I hope to make clear later on, the constitutionality of the application of s. 106.7(1) must be considered in relation to the particular offence in question. Because of the variety of offences created in Part II.1 the role played by s. 106.7(1) will vary with the offence. This in turn will affect the factors to be considered in deciding whether the application of the section can be upheld under s. 1. The determining factor may in some cases be found in the interplay between s. 106.7(1) and the offence provision. Consideration of the objective alone does not appear to take this interplay into account; the proportionality analysis is necessary to do so.

52 The next part of the Oakes inquiry is the proportionality between the provision and the infringement. In evaluating the proportionality of s. 106.7(1), it is important to remember how restrictive is the overall system of registering restricted weapons. There is one person in all of Canada who can issue registration certificates, and [page473] that is the Commissioner of the R.C.M.P. (s. 106.1(7)). The Commissioner is required by statute to keep a registry of all registration certificates issued (s. 106.6(1)(a), and that centralized computer registry, the Canadian Police Information Centre Telex, is available for any police force to consult (Martin L. Friedland, "Gun Control in Canada: Politics and Impact," in A Century of Criminal Justice (1984), at pp. 120-21; Evaluation of the Canadian Gun Control Legislation, First Progress Report (1981), at pp. 83 and 91 (hereinafter First Progress Report)). Although the certificates are issued by the Commissioner, all of the preliminary screening is done by the local registrar of firearms, who investigates applicants to be certain they meet the requirements for possession of a restricted weapon and do not pose any threat to safety (Friedland, at pp. 120-21; First Progress Report, at pp. 91-93; Hawley, Canadian Firearms Law (1988), at pp. 23-37). The local registrar is almost always a member of the local police force with jurisdiction over the certain area, or occasionally a civilian employed by the police (First Progress Report, at pp. 76-77). Finally, a person can possess a restricted weapon at only one of two places: the person's residence, or his or her ordinary place of business (s. 106.1(8)). The local registrar has no authority to issue a registration certificate authorizing the owner to keep the weapon at any other place (R. v. Wilson (1984), 17 C.C.C. (3d) 126 (Alta. Q.B.)) It is an offence for the owner to keep the weapon at any place other than that listed on the registration certificate, or even to take it off the listed premises without a carrying permit (s. 89(2)).

53 The combination of the strict limits contained in the registration certificate and the local administration of the application system means that it "should not be at all difficult" for the Crown to prove that the accused does not have a registration certificate for the weapon. In any area, there will be one local registrar who has jurisdiction over the [page474] location of the accused's residence and normal place of business. (In some cases where an accused lives within one police jurisdiction and works in another, there will be two local registrars who could process the application.) If that local registrar has not received an application for a registration certificate, then no one else could have received one.

54 The first stage of the proportionality inquiry is whether there is a rational connection between the provision and the objective. In this case, the Attorney General of Canada argued strongly that there was a rational connection between the objective of the legislation and s. 106.7(1). In Oakes, this Court held that in the case of a statute which reversed the onus of proof, in order to satisfy this branch of s. 1 analysis, there must be a rational connection between the basic or proved fact and the presumed fact. Here, the proved fact, possession of a restricted weapon, in no way tends rationally to prove the presumed fact, that the accused does not have a registration certificate.

55 Even if a less stringent rational connection should be applied to offences prohibiting certain acts in the absence of a permit or licence, in my view the present appeal is governed by the principles set out in R. v. Holmes, supra. As in that case, I do not think that the provision here

challenged impairs "as little as possible" the presumption of innocence (R. v. Big M. Drug Mart Ltd., supra, at p. 352, Oakes, supra, at p. 139). Presumably, the objective behind Part II.1 does not include convicting persons who are able to raise a reasonable doubt as to their guilt but are unable to establish their innocence on a balance of probabilities. The legislative objective behind Part II.1 can just as easily be met, in the absence of s. 106.7(1), by not requiring an accused to prove on a balance of probabilities that the firearm is or was duly registered. The most that should be necessary is that the accused be required to point to evidence suggesting that the weapon is or was registered. Since the fact of non-registration must be proven for a conviction under s. 89(1), the Crown must be able to provide the trier of fact with sufficient [page475] evidence, be it oral or documentary, to justify concluding beyond a reasonable doubt that the firearm in fact is not or was not registered.

56 The Attorney General of Canada argued that even if s. 106.7(1) places the onus of proof on the accused contrary to s. 11(d), the weight of that burden is greatly reduced by the addition of s. 106.7(2), which I set out again for ease of reference:

106.7 ...

> (2) In any proceedings under any of sections 83 to 106.5, a document purporting to be a firearms acquisition certificate, registration certificate or permit is evidence of the statements contained therein.

The Attorney General of Canada argues that this provision, when coupled with s. 24(1) of the Interpretation Act, R.S.C. 1970, c. I-23, provides a means for the accused to meet the burden of proof set out by s. 106.7(1) without any danger of self-crimination.

57 One objection to reverse onus clauses is that they may force the accused into the witness box, sacrificing the right to remain silent to the requirement that he or she prove a fact on a balance of probabilities or risk conviction. The close links between the two rights were recognized before and after the enactment of the Charter, which now guarantees them both in s. 11(c) and (d). (See R. v. Proudlock, supra, at pp. 550-51; Dubois v. The Queen, [1985] 2 S.C.R. 350, at pp. 356-58; Ratushny, "The Role of the Accused in the Criminal Process", in Beaudoin and Tarnopolsky, eds., The Canadian Charter of Rights and Freedoms: Commentary, at pp. 358-59). Even if the reverse onus clause only relates to one issue, as is the case with s. 106.7(1), an accused who testifies to meet the onus on that point is open to cross-examination on the entire case. Had Parliament provided a way for the accused to enter evidence of the certificate without being required to testify, the arguments of [page476] the Attorney General of Canada would be more compelling. I am not, however, satisfied that Parliament has done so in s. 106.7(2).

58 My reason for concluding that Parliament has not so provided is based on the common law relating to the admission of documents into evidence and the interpretation of s. 106.7(2). Before

any document can be admitted into evidence there are two obstacles it must pass. First, it must be authenticated in some way by the party who wishes to rely on it. This authentication requires testimony by some witness; a document cannot simply be placed on the bench in front of the judge. Second, if the document is to be admitted as evidence of the truth of the statements it contains, it must be shown to fall within one of the exceptions to the hearsay rule (Delisle, Evidence: Principles and Problems, at pp. 103-105; Ewart, Documentary Evidence in Canada, at pp. 12, 13, 33; Wigmore on Evidence, vol. 7, 3rd ed., paras. 2128-2135). These are two distinct issues and in my opinion s. 106.7(2) only addresses the latter. A registration certificate, once admitted, is evidence of the statements it contains, namely that the person it names had complied with the registration requirements for a restricted weapon. How does the document get admitted into evidence?

59 One of the hallmarks of the common law of evidence is that it relies on witnesses as the means by which evidence is produced in court. As a general rule, nothing can be admitted as evidence before the court unless it is vouched for viva voce by a witness. Even real evidence, which exists independently of any statement by any witness, cannot be considered by the court unless a witness identifies it and establishes its connection to the events under consideration. Unlike other legal systems, the common law does not usually provide for self-authenticating documentary evidence.

60 Parliament has provided several statutory exceptions to the hearsay rule for documents, but it less [page477] frequently makes exception to the requirement that a witness vouch for a document. For example, the Canada Evidence Act provides for the admission of financial and business records as evidence of the statements they contain, but it is still necessary for a witness to explain to the court how the records were made before the court can conclude that the documents can be admitted under the statutory provisions (see ss. 29(2) and 30(6)). Those explanations can be made by the witness by affidavit, but it is still necessary to have a witness. Exceptionally, s. 241 of the Criminal Code allows for certificates of analysis for breath and blood samples to be evidence of the facts alleged in them without proof of the authenticity of the document (s. 241(1)(e) to (i)), but the prosecution must give notice of the intention to use the certificates and the accused can require that the analyst attend at trial for cross-examination (s. 241(6) and (7)). There are also common law exceptions to this principle, but the certificate now in issue does not fall within them.

61 In light of the common law of evidence relating to documents, I do not think that s. 106.7(2) can be interpreted as anything more than a provision which allows a certificate to be evidence of the truth of the statements it contains, as an exception to the hearsay rule. It does not mean that a registration certificate is a self-authenticating document that can be received as evidence without a witness. The use of the word "purporting" may indicate that if the certificate is admitted and the Crown wishes to challenge its authenticity it must do so by proof beyond a reasonable doubt, but the word "purporting" by itself is not enough to make the document self-authenticating, contrary to the general common law approach to documentary evidence. Section 106.7(2) does not make it possible for the accused to put the certificate before the court without some witness identifying it.

62 There will always be one other person who can testify whether the accused had a registration

certificate, and that is the local registrar of firearms [page478] who processed the application. The accused could avoid testifying by calling this person instead. As soon as this suggestion is made, it undermines the argument that it is more difficult for the Crown to lead evidence on the question of a registration certificate than it would be for the accused: the local registrar of firearms will likely be a police officer, probably a member of the same force that laid the charges.

63 Section 106.7(1) will either force the accused to testify, in effect requiring him or her to choose between the constitutionally guaranteed rights not to testify or to be presumed innocent, or will require the accused to call a police officer as a defence witness to testify about information contained in police files. In either case, it cannot be said that Parliament has impaired the presumption of innocence as little as possible.

64 It is true of course that it would be very easy for the accused in this case to testify whether or not he had a registration certificate, but in almost every case, the accused is one of the people best able to explain what happened. Yet it is a fundamental value in our society that we not force the accused to testify, even when the accused is the only person who can answer the question. When there are other witnesses available, as in the present situation, there is even less reason to expect the accused to explain events.

65 What is the consequence of a conclusion that s. 106.7(1) cannot be salvaged by s. 1 and that the Crown must disprove the existence of a registration certificate when that is in issue? The very comprehensiveness of the gun control scheme of Part II.1 suggests that the prosecution will be able to meet this requirement. A registration certificate for a restricted weapon is issued for a limited territory only. It will be a relatively easy matter for the Crown to determine if the person has a registration certificate, by enquiring with the local registrar for the area where the accused lives or has a place of business. The local registrar, almost always a police officer or employee of the police, will be able to say whether any application from the accused has ever been received; if not, it is [page479] reasonable to conclude the accused did not have a registration certificate, as no other official could have processed the application. As a back-up, there is also the central registry which the Commissioner is required by statute to maintain of all registration certificates issued, revoked, or refused (s. 106.6). This information is entered on the Canadian Police Information Centre Telex, a centralised computer data bank for the entire country. While it may be the case under some regulatory schemes that it is very difficult for the prosecution to find out whether or not an accused has a required permit or licence, that is not the case here. The police have access to the information, since they are almost invariably the persons responsible for the administration of the Part II.1 registry system, and in any event can consult the computer registry.

66 It is not unreasonable to require the Crown to consult information within the knowledge of the police and to be ready if necessary to produce that information in court. If the argument of convenience to the accused is to be available at all to justify the reversal of the onus of proof under s. 1, it can only be where it is very difficult for the Crown to meet that onus. If it is possible as a general matter for the Crown to meet the onus, then it should be required to do so, even if it would

be easier for the accused to prove the matter. When the police actually have the records in question, or access to them, it is hard to argue that it is difficult for them to prove the absence of the necessary certificate. It is worth noting as well, that the Canada Evidence Act, s. 26(2), explicitly provides for proof by affidavit of an officer having charge of such records that a search has been made and that the officer has been unable to find the appropriate licence or document has been issued.

67 That this is not an impossible task is illustrated by the facts of this case: Allen Prov. Ct. J. convicted the appellant at trial without using s. 106.7(1). [page480] The Crown led enough evidence at trial to persuade Allen Prov. Ct. J. beyond a reasonable doubt that the appellant did not have a registration certificate. It is true that Barkman Co. Ct. J. took a different view of the evidence, but that does not mean the Crown will never be able to prove its case. The Crown could have called Sgt. Pilcher's successor to establish that no certificate was issued after 1979. It could have applied under s. 30 of the Canada Evidence Act to enter the contents of the file as evidence. In this case, the Crown simply failed to establish proof beyond a reasonable doubt.

68 I would conclude that the application of s. 106.7(1) to a person charged with an offence under s. 89(1) is constitutionally invalid. This does not mean, however, that s. 106.7(1) is completely invalid. The section 1 analysis in this case has depended heavily on the nature of registration certificates, including the strict limitations on the area of possession of the restricted weapon and the highly localised administration of the registry system. The section 1 analysis of the presumption in connection with other Part II.1 offences, concerning different certificates or permits, may have a different outcome. For example, firearms acquisition certificates are valid throughout Canada (s. 104(12)). Carrying permits and transport permits allow the owner of a restricted weapon to possess it in different areas, possibly crossing from one police jurisdiction to another (s.106.2(10)). The justification for s. 106.7(1) in connection with these documents will likely involve different issues and a different s. 1 analysis. Since this case does not involve these types of permits or certificates, I would limit the holding in this case to the conclusion that the application of s. 106.7(1) to a person charged with an offence under s. 89(1) cannot be justified under s. 1 of the Charter.

[page481]

69 There is a final point. Parliament has provided in other cases for proof by way of documentary evidence, without the necessity for a witness in court. The certificate of a breathalyzer analyst, referred to earlier, is one such example. The Canada Evidence Act provides another way to prove matters by document. There does not seem to be any difficulty for Parliament to allow similar proof of the files of the local registrar, or possibly of the contents of the Commissioner's central registry.

VIII

Conclusion

70 In sum, it is my opinion that s. 106.7(1) of the Criminal Code violates s. 11(d) of the Charter. The application of s. 106.7(1) to a person charged under s. 89(1) cannot be justified under s. 1. I would therefore answer the constitutional question in the affirmative.

71 I would allow the appeal, set aside the judgment of the Court of Appeal of Manitoba and restore the verdict of acquittal on each of the two charges.

The following are the reasons delivered by

72 BEETZ J.:-- Given the dates of the pre-Charter trial and the post-Charter summary conviction appeal, I assume without deciding that the Canadian Charter of Rights and Freedoms applies to this case, and I agree with Justice McIntyre.

The judgment of McIntyre, La Forest and L'Heureux-Dubé JJ. was delivered by

73 McINTYRE J.:-- I have read the reasons of the Chief Justice which have been prepared for delivery in this appeal. With deference, I am unable to agree with the result he has reached and with the reasons which have led to his conclusion. I will accordingly express my views on this appeal. The Chief Justice has set out the facts, outlined the dispositions made in the courts below and the essence of the reasons given by the judges in those courts.

[page482]

74 The issues raised in the appeal were stated by the appellant in these terms. He submitted that the majority of the Court of Appeal erred in deciding the appeal on a question of fact, or in the alternative, on a question of mixed law and fact; also, that the majority of the Court of Appeal erred in deciding that s. 106.7(1) of the Criminal Code of Canada is constitutionally valid and does not contravene the provisions of s. 11(d) of the Canadian Charter of Rights and Freedoms. As to the first ground, I agree with the Chief Justice that a question of law was raised in this appeal before the Court of Appeal. It involved a question of the admissibility of evidence which, as the Chief Justice said, is a clear question of law.

75 I would agree with the Chief Justice that in order to set aside an acquittal, in this case that recorded by Barkman Co. Ct. J. on the first appeal [(1983), 22 Man. R. (2d) 46] the Crown must satisfy the Court that the result would not necessarily have been the same if the error made at trial had not occurred. I do not accept, however, considering the evidence adduced and the nature of the evidence excluded, that the Crown failed to meet that test. This disagreement does not assume great significance here, however, because it is evident from the reasons of Barkman Co. Ct. J. that his acquittal of the appellant depended upon his finding that s. 106.7(1) of the Criminal Code offended s. 11(d) of the Charter. After stating that the evidence called by the Crown (the appellant gave no evidence) was insufficient to establish guilt, he said:

> I am therefore of the opinion that the accused should not have been convicted unless the provisions of s. 106.7(1) are applicable.

Then, after considering the section and the provisions of s. 11(d) of the Charter, he concluded by saying:

> I therefore find the learned provincial court judge erred in admitting hearsay evidence and I find that s. 106.7 (1) does not apply because it offends s. 11(d) of the Canadian Charter of Rights and Freedoms.

[page483]

He had already found that the appellant had possession of the weapons and his acquittal then depended on his finding that s. 106.7(1) was unconstitutional. In other words, he rejected the section on the basis that it reversed the onus of proof. The issue of the constitutionality of the section is therefore vital to a decision in this case.

76 I turn to the constitutional point. Section 89(1) and s. 106.7 of the Criminal Code, the sections with which we are primarily concerned in this appeal, form part of Part II.1 of the Code which deals with firearms and other offensive weapons. The Code has included provisions for the control, use and possession of firearms since the enactment of the 1892 Criminal Code, S.C. 1892, c. 29, s. 105. That section prohibited the possession of pistols and air guns at other than specific places and, as well, provided for exemptions from the operation of the section. Since that time, there have been successive amendments which without exception have strengthened the controls upon possession and use of firearms. The history of this process is summarized by Martin L. Friedland, A Century of Criminal Justice (1984), commencing at p. 125. He concludes, at p. 128, with what may be considered a sober warning:

> Canada has been fortunate in having had a gradual development of control over firearms for the past 100 years. We have never had to face a situation as in the United States today, which appears to many observers to be almost out of control.

This is a consideration which may well be significant in any judicial approach to the construction of Part II.1 of the Code. It is evident that the strict control of handguns has been and remains an essential feature of the Canadian gun control laws.

77 It is clear that the overall intent of Parliament in enacting Part II.1 of the Criminal Code was to prohibit the acquisition and use of weapons save in accordance with the strict controls it prescribed. Section 89(1) under which the appellant was charged gives effect to this intention by providing that:

[page484]

> 89. (1) Every one who has in his possession a restricted weapon for which he does not have a registration certificate
>
> (a) is guilty of an indictable offence and is liable to imprisonment for five years; or
> (b) is guilty of an offence punishable on summary conviction.

It is evident then that only one possessing a restricted weapon for which he has no registration certificate can be convicted under the section. If a certificate of registration is not obtained, a criminal offence arises from the mere possession of the restricted firearm. Section 89(1) does not apply to anyone who has a valid certificate which is a condition precedent to the lawful possession of the weapons.

78 The argument is made that s. 106.7(1) imposes a reverse onus of proof upon the accused in a prosecution under s. 89(1). Section 106.7(1) reads:

> 106.7(1) Where, in any proceedings under any of sections 83 to 106.5, any question arises as to whether a person is or was the holder of a firearms acquisition certificate, registration certificate or permit, the onus is on the accused to prove that that person is or was the holder of such firearms acquisition certificate, registration certificate or permit.

79 In pre-Charter cases the imposition of a reverse onus upon an accused was frequently recognized and accepted as an exception to the general rule requiring proof by the Crown of all elements of an offence beyond a reasonable doubt. It was settled, as well, that where the accused was required to discharge an onus relating to an element of a criminal offence, he had to do so according to the civil standard of proof, that is, he had to establish the matter on a balance of probabilities. A statement of the rule, as then accepted, is to be found in R. v. Appleby, [1972] S.C.R. 303. It must be recognized now, however, that a statutory provision which imposes a burden of proof or disproof of an element of an offence on an accused creates [page485] an impermissible reverse onus under the Charter: see R. v. Vaillancourt, [1987] 2 S.C.R. 636, at p. 655; R. v. Oakes, [1986] 1 S.C.R. 103; and R. v. Whyte, [1988] 2 S.C.R. 3. It has been held that any statutory provision which could have the effect of permitting a conviction, notwithstanding the existence of a reasonable doubt as to guilt, would contravene s. 11(d) of the Charter which guarantees the right to be presumed innocent until proven guilty according to law.

80 In my view, however, these principles cannot be of assistance to the appellant here. There is

no reverse onus imposed upon the accused by s. 106.7(1), despite the words which are employed in the section. The holder of a registration certificate cannot be made subject to a conviction under s. 89(1). He is not required to prove or disprove any element of the offence or for that matter anything related to the offence. At most, he may be required to show by the production of the certificate that s. 89(1) does not apply to him and he is exempt from its provisions. Far from reversing any onus, s. 106.7 provides in subs. (2) that a document purporting to be a valid registration certificate is evidence and, therefore, prima facie proof of the statements contained therein and in the case at bar conclusive proof, as provided in s. 24(1) of the Interpretation Act, R.S.C. 1970, c. I-23, set out hereunder:

> 24. (1) Where an enactment provides that a document is evidence of a fact without anything in the context to indicate that the document is conclusive evidence, then, in any judicial proceedings, the document is admissible in evidence and the fact shall be deemed to be established in the absence of any evidence to the contrary.

As Hart J.A. stated in R. v. Conrad (1983), 8 C.C.C. (3d) 482 (N.S.C.A.), at p. 487, dealing with a charge under s. 87 of the Criminal Code:

> The crime is to carry a weapon concealed, and all persons who do so are guilty of the offence. Certain persons are, however, exempted from this prohibition [page486] provided they establish their right to exemption before the court. The requirement that they affirmatively establish their privilege of possessing and carrying a restricted weapon does not, in my opinion, interfere with or impede their right to be presumed innocent. The existence of their privilege is not a fact which must be negatived [sic] by the Crown beyond a reasonable doubt in proving the offence charged. No presumption of guilt arises from the combination of ss. 87 and 106.7(1) of the Criminal Code. This is not a situation where a person is deemed to be guilty of an offence unless he establishes his innocence. He is in fact deemed to be not guilty of an offence under s. 87 if he holds a permit of exemption, but the burden is cast upon him to establish that he falls within the exemption given to him. [Emphasis added.]

Although the accused must establish that he falls within the exemption, there is no danger that he could be convicted under s. 89(1), despite the existence of a reasonable doubt as to guilt, because the production of the certificate resolves all doubts in favour of the accused and in the absence of the certificate no defence is possible once possession has been shown. In such a case, where the only relevant evidence is the certificate itself, it cannot be said that the accused could adduce evidence sufficient to raise doubt without at the same time establishing conclusively that the certificate had been issued. The theory behind any licensing system is that when an issue arises as to the possession of the licence, it is the accused who is in the best position to resolve the issue. Otherwise, the issuance of the certificate or licence would serve no useful purpose. Not only is it

rationally open to the accused to prove he holds a licence (see R. v. Shelley, [1981] 2 S.C.R. 196, at p. 200, per Laskin C.J.), it is the expectation inherent in the system.

81 Therefore, in my view, s. 106.7(1) does not violate s. 11(d) of the Charter. On that basis, I would dismiss the appeal and uphold the conviction.

Section 1 Analysis

82 In view of the conclusion that I have reached on the constitutional question, it is not necessary for [page487] me to consider the application of s. 1 of the Charter. However, since the question has been raised and argued, I will deal with s. 1 for the purposes of this discussion on the assumption that s. 106.7(1) does infringe the s. 11(d) right. In my view, s. 106.7(1) is clearly sustainable as a reasonable limit prescribed by law which can be demonstrably justified in a free and democratic society. The Chief Justice by reference to R. v. Oakes, supra, has set out the general approach to s. 1 which that case dictates. On the basis of the Oakes test, the impugned section is clearly sustainable. The purpose of Part II.1 and its component sections, including s. 89(1), most assuredly aims at an objective "of sufficient importance to warrant overriding a constitutionally protected right or freedom" (see Oakes, p. 138). The private possession of weapons and their frequent misuse has become a grave problem for the law enforcement authorities and a growing threat to the community. The rational control of the possession and use of firearms for the general social benefit is too important an objective to require a defence. Therefore, I agree with the Chief Justice in his conclusion that the provisions of Part II.1, in general, and s. 106.7(1), in particular, satisfy the first test, that is, that they serve an important social objective.

83 The second test in Oakes involves a consideration of proportionality. In my view, s. 106.7(1) meets that test as well. This Court has repeatedly observed that the proportionality test must be flexible to avoid a rigid confinement of the Court's consideration to fixed and unchanging standards. The Chief Justice has said in Oakes, at p. 139:

> Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups.

[page488]

A certain element of common sense must dictate: the Chief Justice observed in Oakes, at p. 138, that:

> ...there may be cases where certain elements of the s. 1 analysis are obvious or self-evident.

In R. v. Edwards Books and Art Ltd., [1986] 2 S.C.R. 713, he stated at pp. 768-69:

> The Court stated that the nature of the proportionality test would vary depending on the circumstances. Both in articulating the standard of proof and in describing the criteria comprising the proportionality requirement the Court has been careful to avoid rigid and inflexible standards.

Again, at pp. 781-82:

> A "reasonable limit" is one which, having regard to the principles enunciated in Oakes, it was reasonable for the legislature to impose. The courts are not called upon to substitute judicial opinions for legislative ones as to the place at which to draw a precise line. [Emphasis added.]

La Forest J. (concurring in the result in Edwards Books, supra) made the following comment, at pp. 794-95:

> Let me first underline what is mentioned in the Chief Justice's judgment, that in describing the criteria comprising the proportionality requirement, the Court has been careful to avoid rigid and inflexible standards. That seems to me to be essential. Given that the objective is of pressing and substantial concern, the Legislature must be allowed adequate scope to achieve that objective. It must be remembered that the business of government is a practical one. The Constitution must be applied on a realistic basis having regard to the nature of the particular area sought to be regulated and not on an abstract theoretical plane....
>
> By the foregoing, I do not mean to suggest that this Court should, as a general rule, defer to legislative judgments when those judgments trench upon rights considered fundamental in a free and democratic society. Quite the contrary, I would have thought the Charter established the opposite regime. On the other hand, having accepted the importance of the legislative objective, one must in the present context recognize that if the legislative goal is to be achieved, it will inevitably be achieved to the detriment of some. Moreover, attempts to protect the rights of one group will also inevitably impose burdens on the rights of other groups. There is [page489] no perfect scenario in which the rights of all can be equally protected.
>
> In seeking to achieve a goal that is demonstrably justified in a free and democratic society, therefore, a legislature must be given reasonable room to manoeuvre to meet these conflicting pressures. Of course, what is reasonable will vary with the context. Regard must be had to the nature of the interest infringed

> and to the legislative scheme sought to be implemented.

And, in R. v. Morgentaler, [1988] 1 S.C.R. 30, the Chief Justice said, at pp. 73-74:

> In Oakes, at p. 139, the Court referred to three considerations which are typically useful in assessing the proportionality of means to ends. First, the means chosen to achieve an important objective should be rational, fair and not arbitrary. Second, the legislative means should impair as little as possible the right or freedom under consideration. Third, the effects of the limitation upon the relevant right or freedom should not be out of proportion to the objective sought to be achieved.

84 In my view, the proportionality test in Oakes is easily satisfied in this case. Before going further, it will be helpful to state in simple terms just what is required of persons who wish to possess and use restricted weapons. They are required to register the weapons. Having done so, they are provided with a certificate which excludes them from the provisions of Part II.1 within the terms of their certificate. If a question arises as to the existence of a permit or certificate, they are required to produce it. That is the burden imposed upon a person lawfully in possession of a restricted weapon. In this way, the legislative purpose implicit in s. 89(1) of the Criminal Code is recognized and given effect. A condition precedent to the lawful possession of a restricted weapon is the obtaining of a valid registration certificate by the possessor. If the certificate is not held, a criminal offence has been committed by the mere fact of possession. Thus, a balance has been struck between the interest of the community in the control of possession and use of firearms and the interest of those who desire to possess and make lawful use of firearms. Considering then the first branch of the proportionality test, it is completely "rational, fair and not arbitrary" that where any question arises as to whether the proper certificate has been [page490] issued the accused be expected to produce it. This is particularly true where, as here, the impugned legislative provisions provide to the lawful weapon holder an absolute defence or immunity from prosecution. It is, in my view, irrelevant that possession of a restricted weapon "in no way tends rationally to prove" any lack of registration certificate, for the possession of the weapon in the absence of the certificate is an offence complete in itself. In addition, as has been pointed out earlier, there is no possibility that a person could be convicted despite the existence of a reasonable doubt as to his guilt. This could not occur. In my view, therefore, it is totally unreasonable to require the Crown to prove the non-occurrence of an event (registration) for which the Criminal Code itself provides the only relevant evidence directly to the affected party. As Brooke J.A. said in R. v. Lee's Poultry Ltd. (1985), 17 C.C.C. (3d) 539 (Ont. C.A.), at p. 544 regarding the comment by Dubin J.A. during the argument on that case:

> "How could it be unfair to ask a person to produce his licence or evidence that he has one? Surely, it is the sensible thing to do".

85 Secondly, s. 106.7(1) should impair as little as possible the right to be presumed innocent. The

Chief Justice objects to an obligation on an accused to produce a licence on the basis that it may force the accused into the witness box. Reference was made to a passage from pp. 184-85, Glanville Williams, The Proof of Guilt (3rd ed. 1963), in support of the argument against making exceptions to the principle that the Crown bear the onus of proof. The words which follow the excerpt referred to by the Chief Justice, however, cast light upon the question of requiring the accused to enter the witness box. The learned author continued his discussion, at p. 185, with the following:

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> There is a clear if subtle difference between shifting the burden of proof, or risk of non-persuasion of the jury, and shifting the evidential burden, or burden of introducing evidence in proof of one's case. It is not a grave departure from traditional principles to shift the evidential burden, though such a shifting does take away from the accused the right to make a submission that there is no case to go to the jury on the issue in question, and it may in effect force him to go into the witness-box.

In any event, the risk of cross-examination upon going into the witness box would be relatively small, given that the only relevant issue to which it would ordinarily be addressed is as to whether a registration certificate had been properly acquired and, in any event, under s. 13 of the Charter and the judgments of this Court in Dubois v. The Queen, [1985] 2 S.C.R. 350, and R. v. Mannion, [1986] 2 S.C.R. 272, which applied its provisions, the cross-examination could not be used against the accused in any other case and an accused would be exposed to no danger in that respect. Of more importance, however, is the fact that the concern is more academic than real because the mere existence of a valid certificate would ordinarily forestall any criminal proceedings. It becomes improbable, to say the least, that an accused will ever be forced to testify merely to produce his licence. In my view, the fact that an accused might be required to enter the witness box to tender his certificate would not be a matter of great significance and certainly not one which would justify a finding of unconstitutionality of s. 106.7(1). Therefore, in my view, Parliament has impaired very minimally the presumption of innocence by requiring an accused to show his licence as proof of lawful possession.

86 Finally, there is no doubt that the third test of proportionality, as between the limitation of the Charter right and the objectives sought to be achieved, is also amply demonstrated. It has been suggested that it "should not be at all difficult" for the Crown to prove a negative, namely, that no certificate had been issued. This, however, is to [page492] deny the many problems of proof which the licensing system was itself designed to avoid. First is the problem of the number of registrars who could deal with the application for registration. The local registrar can issue a certificate based on the normal place of business even though the accused lives in another city or province. If an

accused carries on several businesses in diverse areas or resides at varying locations, is it reasonable to expect that several local registrars be called to testify that after a search of their records they could find no certificate issued? I am unable to agree with the Chief Justice in his conclusion that:

> If that local registrar had not received an application for a registration certificate, then no one else could have received one.

It is not necessarily an easy matter for the Crown to prove non-registration. The existence of a central computerized registry system offers no complete answer to the problems facing the Crown in meeting the burden the Chief Justice would impose. To authenticate the accuracy of a computer file could involve extensive evidentiary procedures and much would need to be proven in order to verify the completeness of the computer record and the absence of a certificate for an accused. This would be an inordinate burden on the Crown in criminal enforcement when Parliament itself adopted the reasonable alternative of providing the accused with a certificate which would establish his innocence by its mere production.

87 The measures adopted in Part II.1 of the Criminal Code are carefully tailored to effect a balance between the community interest and that of those who desire to possess weapons lawfully and they are clearly appropriate to the objectives sought. Only minimal interference is made with the right of the individual weapon possessor. His rights from a practical point of view are limited to the least extent possible. Even if there is merit in the suggestion that the Crown, using computers and [page493] modern technology, could easily negate the fact of the existence of a permit, Parliament has made a reasonable choice in the matter and, in my view, it is not for the Court, in circumstances where the impugned statutory provision clearly involves, at most, minimal -- or even trivial -- interference with the right guaranteed in the Charter, to postulate some alternative which in its view would offer a better solution to the problem, for to do so is to enter the legislative field, so far at least not entirely removed from Parliament. I would therefore hold that any limits imposed by s. 106.7(1) of the Criminal Code are sustainable under s. 1 of the Charter.

88 A constitutional question was posed in these terms:

> Is section 106.7(1) of the Criminal Code of Canada constitutionally invalid in that it contravenes the provisions of s. 11(d) of the Canadian Charter of Rights and Freedoms?

89 I would answer the question in the negative, dismiss the appeal and restore the conviction.

The following are the reasons delivered by

90 LAMER J. (dissenting):-- I agree with the Chief Justice in all regards except for the objective he assigns to s. 106.7(1) when under the s. 1 scrutiny he takes the section through the Oakes test. While I certainly do agree with him that "to discourage the use of firearms by the criminal element of our society" is an objective which "relate(s) to concerns which are pressing and substantial in a

free and democratic society", and that such an objective "satisfi[es] the first stage of the approach to s. 1 set out in Oakes", I am, with respect of the view that is the object the attainment of which is sought through making it an offence to possess unregistered restricted weapons, under s. 89(1) and the various other sections restricting or prohibiting possession or use of different types of weapons.

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91 Section 106.7(1) is not particular nor essential to weapons legislation. It is a purely evidentiary section which could be appended or directed to any number of laws requiring the licensing of persons or the registration of certain things, such as in this case guns, but also automobiles under provincial legislation, dogs under municipal by-laws, to name but a few. The objective of a section such as s. 106.7(1) is to relieve the prosecution of the inconvenience -- a slight one in these days of computers and of instant communication facilities -- of securing a certificate from the appropriate authority attesting to the absence of any record establishing registration. It is in no way part of the arsenal in the war against crime involving weapons. Its sole purpose is administrative convenience. When the cost of this convenience is the restriction of an accused's rights under s. 11(d) in the context of the prosecution of a Criminal Code offence, it is clearly not an objective of sufficient importance to warrant overriding such a right. This to me ends the s. 1 enquiry.

92 Before concluding, I should add that this is not to say that, in a setting where imprisonment is not available as a penalty and where conviction does not carry the stigma of a criminal record, administrative convenience could not prevail over the rights of the citizen. But this is not the case here.

93 Subject to these remarks, I concur in the reasons of the Chief Justice and in his disposition of this appeal.